TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 611

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, PETITIONER

vs.

KENNETH G. SMITH AND FOREMAN-STATE TRUST AND SAVINGS BANK, EXECUTORS OF THE WILL OF DOUGLAS SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 7, 1933
CERTIORARI GRANTED FEBRUARY 20, 1933

(37296)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 601

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, PETITIONER

vs.

KENNETH G. SMITH AND FOREMAN-STATE TRUST AND SAVINGS BANK, EXECUTORS OF THE WILL OF DOUGLAS SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable John P. Barnes District Judge of the United States for the Northern District of Illinois, on Twenty-Eighth day of July, in the year of our Lord one thousand nine hundred and Thirty-One, being one of the days of the regular July Term of said Court, begun Monday, the Sixth day of July, and of our Independence the 156th year.

Present:

Honorable John P. Barnes

H. C. W. Laubenheimer, U. S. Marshal.

Charles M. Bates, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

Kenneth G. Smith and Foreman-State Trust and Savings Bank, a banking corporation, Executors of the Will of Douglas Smith, deceased
vs.
Mabel G. Reinecke, formerly Collector of Internal Revenue for the First Collection District of Illionis.
} No. 38956.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Declaration in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 8th day of August, 1930.

3 • • (Caption) • •

DECLARATION.

Now Come Kenneth G. Smith and Foreman-State Trust and Savings Bank, a banking corporation, Executors of the Will of Douglas Smith, Deceased, by their attorneys Hopkins, Starr & Hopkins and Burry, Johnstone, Peters & Dixon and complain of Mabel G. Reinecke, formerly Collector of Internal Revenue of the United States for the First Collection District of Illinois, of a plea of trespass on the case on promises, and for cause of complaint say:

First Count.

1. That plaintiff, Foreman-State Trust and Savings Bank, is a banking corporation and public trust company duly organized and existing under and by virtue of the Laws

of the State of Illinois and having its principal office and place of business at Thirty-three North La Salle Street, Chicago, Illinois; that Foreman-State Trust and Savings Bank and Kenneth G. Smith, plaintiffs herein, are citizens of the United States and residents of the City of Chicago, State of Illinois; that said Foreman-State Trust and Savings Bank and Kennteh G. Smith are the Executors of the last will and testament of Douglas Smith, Deceased, who died testate on November 7, 1927, a resident of the City of Chicago of Cook County in the State of Illinois,
4 and a citizen of the United States; that the last will and testament of Douglas Smith, Deceased, was duly admitted to probate by the Probate Court of said Cook County, Illinois, which then and there had jurisdiction thereof, on, to-wit, the 18th day of November, 1927, and on said date, to-wit, the 18th day of November, 1927, letters testamentary were granted by the said Probate Court of Cook County, Illinois, to the plaintiffs herein; that the plaintiffs bring into Court here the letters testamentary so granted to them by the said Probate Court of Cook County, Illinois, whereby it fuly appears to the Court here that the plaintiffs are the Executors of the said last will and testament of the said Douglas Smith, Deceased, and have the execution thereof;

2. That Mabel G. Reinecke, the defendant herein, was on, to-wit, January 1st, 1925, and prior thereto and from thence continuously up to and including March 31, 1929, Collector of Internal Revenue of the United States for the First Collection District of Illinois, in which are said Chicago and Cook County, and said defendant now is, as she long has been, a resident of the City of Chicago and State of Illinois;

2. That the cause of action herein exhibited by plaintiffs against defendant is one arising under the laws of the United States providing for Internal Revenue;

4. That on or about, to-wit, September 25, 1922, in the City of Chicago and State of Illinois, the said Douglas Smith, a resident of said City, and a citizen of the United States, by four separate indentures on that day and at the place aforesaid duly executed by him as grantor, and by himself and the said Kenneth G. Smith and Foreman Bros. Banking Company, a corporation organized and existing under and by virtue of the Laws of the State of Illinois (now Foreman-State Trust and Savings Bank) as Trustees established four trusts known respectively as the Emaroy Trust, the June

Trust, the Florence Trust and the Kenneth Trust for
5 the benefit, respectively, of his wife, Emaroy J. Smith,
his daughters, June Keith Slater and Florence Gifford Ellis, and his son, Kenneth G. Smith, hereinafter sometimes referred to as the beneficiaries under said trusts, respectively; that thereafter on or about, to-wit, October 30, 1922, in the City of Chicago and State of Illinois, the said Douglas Smith, by an indenture on the day and at the place last aforesaid duly executed by him as grantor, and by himself and the aforesaid Kenneth G. Smith and Foreman Bros. Banking Company, a corporation, as trustees, established a trust known as the General Trust for the benefit of his wife, Emaroy J. Smith, and his two daughters, June Keith Slater and Florence Gifford Ellis, and his son, Kenneth G. Smith; that in and by each of said five trust indeutures, the said Douglas Smith, Kenneth G. Smith and Foreman Bros. Banking Company, were constituted the trustees of the trusts thereby established; that at the time of the establishment of said trusts, respectively, and from thence continuously to and including October 22, 1924, Foreman Bros. Banking Company (later during said period known as The Foreman Trust & Savings Bank, now Foreman-State Trust and Savings Bank) was an Illinois corporation duly authorized to act as a trustee of said trusts and the said Douglas Smith and Kenneth G. Smith were each of them citizens or Illinois, of full age and lawfully qualified to act as trustees of said trusts;

5. That in and by the said trust indentures establishing the said Emaroy Trust, the June Trust and the Florence Trust, the grantor, Douglas Smith, conveyed and assigned to the trustees thereof, in the case of each trust respectively, in the order named above, fifty (40) shares, thirty (30) shares, and thirty (30) shares of the common capital stock of the Pepsodent Company, an Illinois corporation, and provided that the same was to be held and managed by said trustees and the income therefrom and from all other trust property was to be by them collected and reinvested and
accumulated until said stock and all said accumulations
6 and additions thereto amounted, in the case of each trust
respectively, in the order named, to the sum of $500,000.00, $300,000.00 and $300,000.00 and thereafter said trustees were to pay over the net income of each of said trusts to the respective beneficiaries thereof, that is to say, to the said Emaroy J. Smith, June Keith Slater and Florence Gif-

ford Ellis, respectively, during their respective lives; that in and by each of said trust instruments it was further provided that upon the death of the beneficiary thereof, the trust thereby established should thereupon terminate and the trust property thereof be distributed as the beneficiary thereof should by will appoint, and in default of such appointment, in the case of the Emaroy Trust, the trust property was to be distributed to the aforesaid June, Florence and Kenneth Trust in equal shares, and in the case of the June and Florence Trust, to the surviving issue of the respective beneficiaries thereof, the income only from their share of said principal to be paid to said issue until they respectively should reach the age of twenty-one years, and that in the event the respective beneficiaries of said June and Florence Trusts died leaving no issue, then the respective trust estates were to be distributed in equal shares to the trusts established in favor of the other two children of Douglas Smith, as above set out;

6. That in and by the said trust indenture establishing the general Trust as above set out, the grantor, Douglas Smith, conveyed and assigned to the trustees thereof five hundred thirty-nine (539) shares of the common capital stock of the Pepsodent Company, an Illinois corporation, and provided that the same should be held and managed by said trustees and that out of the net income of said trust they should pay $3,000.00 a month to Emaroy J. Smith and $900.00 a month each to June Keith Slater and Florence Gifford Ellis, during their respective lives, or, in the case of the said Emaroy J. Smith, until the property held by said
7 trustees in the Emaroy Trust should amount in value to $500,000.00, or, in the case of the said June Keith Slater and Florence Gifford Ellis, respectively, the property held by said trustees in the June and Florence Trusts, respectively, should amount to the sum of $300,000.00, said sums so to be paid to the said Emaroy, June and Florence to be abated and diminished proportionately in the event said net income of the General Trust should prove insufficient to pay the full amounts of income as therein directed, and that the said net income of said General Trust in excess of the sums so to be paid to the said beneficiaries thereof, was to be paid 5/11 thereof to the Emaroy Trust and 3/11 thereof to each of the June and Florence Trusts, the said payments to continue until the full principal of the Emaroy, June and Florence Trusts had been established as above set out; that in

and by said trust indenture the grantor provided that in the event of the death of the said wife of the grantor or of either of his said daughters, no further payment should be made to the separate trust created for the benefit of such person so dying but the payments of income which were to be made under the provisions of said General Trust indenture to said separate trust should be apportioned between the separate trusts created for the survivors of the said three beneficiaries of the said General Trust, that in case of the death of either of said daughters of Douglas Smith leaving children her surviving, a portion of the principal of the General Trust should thereupon be set aside in value sufficient, when added to the value of the principal of the separate trust created for the benefit of the daughter so dying, to make up a total of $300,000.00, said portion of said principal to be known as the Supplemental Fund, that the income therefrom should be paid to children of the daughter so dying in equal shares during their lives until they respectively arrived at the age of twenty-one years, and that upon their respectively reaching that age, the principal from which they should then be receiving said income should be delivered to them respectively as their absolute property; that in and by said trust indenture establishing the General Trust, the grantor further provided that upon the establishment of the full principal of the said Emaroy, June and Florence Trusts, as above set out, or their prior termination, the principal of the said General Trust, except said Supplemental Fund or Funds, should be delivered to the Kenneth Trust, or if Kenneth G. Smith should have then attained the age of forty (40) years, the same should be delivered to him as his absolute property, or, if he should not then be living, to such other persons as were entitled to the principal of the Kenneth Trust under the terms thereof;

7. That in and by the said trust indenture creating the Kenneth Trust as aforesaid, the grantor, Douglas Smith, conveyed and assigned to the trustees thereof one hundred (100) shares of the common capital stock of the Pepsodent Company, an Illinois corporation, and provided that the same should be held and managed by the said trustees and the net income thereof paid to the said Kenneth G. Smith in monthly installments until he attained the age of forty (40) years at which time the principal of said trust should be delivered to him as his absolute property, that in case of the death of Kenneth G. Smith prior to his attaining the said

age of forty (40) years, said principal should be paid over and delivered as the said Kenneth G. Smith might by will appoint, that in default of such appointment, if he died leaving issue and/or a widow, said principal should be divided between them in the proportions therein set out, but if the said Kenneth G. Smith died leaving a widow and no issue, then one-third of said principal should go to said widow and two-thirds thereof should be divided equally between the June and Florence Trusts, and that if he died leaving no issue and no widow, the whole of the said principal should be divided equally between the said June and Florence Trusts;

8. That in each of the said five trust indentures it
9 was provided that in the case of refusal or inability of a trustee to act or in the case of the death of a trustee, the remaining trustees should have the authority and duty to appoint a successor trustee, providing, however, that one trustee always should be a bank or trust company of the City of Chicago; that each of said five trust indeutures creating the said Emaroy, June, Florence, Kenneth and General Trusts, contained a provision, identically the same in each indenture, in the words as follows:

"Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors.";

9. That true and correct copies of said five trust indentures containing the provisions of the said Emaroy, June, Florence, Kenneth and General Trusts are attached hereto and marked respectively, in the order named, "Exhibit A", "Exhibit B", "Exhibit C", "Exhibit D", and "Exhibit E" and said copies of said trust indentures and the provisions therein contained are by this reference incorporated herein and made a part hereof as fully as if herein set out at length;

10. That under the terms of each of said five trust indentures, Douglas Smith had no control over said trusts or any of them except as one of the three trustees thereof; that except as one of said three trustees, he had no title to the principal of said trusts or of any of them, and had no right to receive the same or to dispose of it; that except as one of said three trustees, he was not entitled to the income of said trusts or any part thereof or entitled to receive the same or to dispose of it or any part thereof, and had no right, title or authority to receive, hold or dispose of the same or any

part thereof except as directed by said trust indentures respectively; that throughout the period of the existence of said five trusts the said Douglas Smith in fact never received, directly or indirectly, to his own use or for his own benefit, any of the income thereof and never exercised any control over the same.

11. That said five trusts continued to exist under the respective terms of the said five trust indentures in the manner above set out from the respective dates of said trust indentures continuously until, to-wit, October 22, 1924, when each of said trust instruments was modified by a separate writing, duly executed by the said Douglas Smith and the other two trustees of the trust thereby established, wherein and whereby the said Douglas Smith resigned as a trustee of each of said trusts and wherein and whereby the remaining trustees appointed a third person, therein named, to succeed him as such trustee; that in and by said modifications, the provision contained in each of said five trust indentures, as above set out, that said trusts and each of them might be revoked or modified by a writing signed by the said Douglas Smith and one of the other two trustees was in each instance so altered that said trust and each of them were not thereafter revocable or subject to modification by the said Douglas Smith either acting alone or in conjunction with any other person;

12. That during the period January 1, 1924, to, to-wit, the 22d day of October of said year, being the date of the execution of the modifications of said five trust indentures as hereinabove set out, the net taxable income of said five trusts amounted to the aggregate sum of $159,240.61; that having theretofore on or about, to-wit, March 14, 1925, filed a tentative income tax return for the calendar year, in which was set out an estimated income tax for said year in the sum of $64,000.00 which did not include any income tax upon or by reason of the said net taxable income of said five trusts for said period, or any part thereof, the said Douglas Smith on or about, to-wit, May 14, 1926, filed with the defendant, Mabel G. Reinecke, the then Collector of Internal Revenue at Chicago, Illinois, his individual income tax return for the said calendar year 1924 and included in his said individual income tax return as Item 9 (b) therein, the aforesaid net taxable income of said five trusts in the said sum of $159,240.61; that the said income of said five trusts for said period in said amount was so included by the said Doug-

las Smith in his said income tax return involuntarily and under protest and duress; that said protest was duly filed in writing by the said Douglas Smith with his said return;

13. That the income taxes due to the United States upon the net taxable income for the year 1924 set out in the said individual return of income so filed by the said Douglas Smith as aforesaid, including the aforesaid net taxable income of said five trusts in the sum of $159,240.61, was the sum of $121,265.95; that said income tax in same amount was assessed against the said Douglas Smith and was by him, involuntarily and under protest and duress and to avoid threatened penalties and distraint of his property, paid to the defendant, the said Mabel G. Reinecke, the then Collector of Internal Revenue of the United States for the First Collection District of Illinois, at Chicago, Illinois, in installments as follows, that is to say, on March 14, 1925, $16,000.00; on May 13, 1925, $14,313.99; on June 12, 1925, $30,313.99; on September 14, 1935, $30,313.98; and on December 14, 1925, $30,313.99; that of the said income taxes for the year 1924 in the said sum of $121,255.95 so assessed against the said Douglas Smith and by him under protest and duress paid to the defendant, Mabel G. Reinecke, as aforesaid, the sum of $59,896.51 was assessed against him and by him involuntarily paid to the defendant, as above set out, upon and by reason of the aforesaid net taxable income of said five trusts in the sum of $159,240.61, which was by him included in his said individual return of income for the year 1924, under protest and duress, as hereinabove set out;

14. That the Revenue Act of 1924 was enacted and became a law on June 2, 1924; that Section 219, Paragraph (g), of that Act provided as follows:

"Where the grantor of a trust has, at any time during
12 the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

15. That the said Douglas Smith never, directly or indirectly, received any of the aforesaid net income of said five trusts in the said sum of $159,240.61 upon which he was required to and did pay income taxes in the said sum of $59,996.51, under protest and duress as aforesaid, other than as one of the said three trustees of said trusts; that through-

out the period from January 1, 1924 to, to-wit, October 22, 1924, the said Douglas Smith alone had no power to revoke said five trusts or any of them or to revest in himself title to any part of the corpus of said trusts or any of them, but said trusts and each of them could be revoked by him and he could revest in himself title to the corpus of said trusts only with the consent in writing of one of the other two trustees thereof, namely, the said Kenneth G. Smith and Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company); that said trusts and each of them remained in existence unrevoked throughout the period from January 1, 1924 to, to-wit, October 22, 1924, as aforesaid, and immediately upon the receipt during said period, of the said income of said five trusts in the net amount of $159,-240.61, or of any part thereof, said income forthwith belonged to and was received and retained by said trusts and the beneficiaries thereof in accordance with the terms of each of said five trust indentures; that said income was in fact distributed by said trustees and was received by said beneficiaries to their own separate use and benefit in accordance with the provisions of said five trust indentures; that such income was not the income of the said Douglas Smith, was never received by him to his own use or for his own benefit, either directly or indirectly, and could not legally be taxed to him;

13 61. That during the said period from January 1, 1924, to to-with October 22, 1924, and prior and subsequent thereto, and under the express provision contained in such five trust indentures, Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company) was entitled to receive compensation from each of said five trusts as one of the trustees thereof, and upon becoming trustee, as aforesaid, and in all its acts as trustee of said five trusts and each of them, said Foreman-State Trust and Savings Bank was a representative of and was acting for the beneficiaries of said five trusts; that the said Kenneth G. Smith, as one of the trustees of said five trusts was likewise, during said period and prior and subsequent thereto, entitled to compensation from each of said five trusts, as one of the trustees thereof, and was a representative of and was acting for the said beneficiaries thereof; that in addition thereto the said Kenneth G. Smith in his individual capacity was otherwise a beneficiary of each of said five trusts under the terms of each of said trust indentures, respectively; that at no time during the year 1924 did

Douglas Smith, the grantor of said five trusts, have power to revest in himself title to any part of the corpus of the said trusts or any of them without the consent in the case of each of said five trusts, of a beneficiary thereof;

17. That the collection from the said Douglas Smith by the defendant, Mabel G. Reinecke, under protest and duress as aforesaid, of said income taxes for calendar wear 1924 in the said sum of $121,255.95, to the extent of the said sum of $59,896.51, assesed and collected from the said Douglas Smith upon and by reason of the inclusion in his income tax return of the said net taxable income of said five trusts in the sum of $159,240.61, was arbitrary, unauthorized, illegal and without warrant of law;

18. That on, to-wit, May 16, 1929, these plaintiffs, as the Executors of the last Will and Testament of Douglas Smith, Deceased, within the time prescribed therefor by law, filed with the then Collector of Internal Revenue for the First Col-
14 lection District of Illinois, at Chicago, Illinois their duly executed claim for refund of income taxes paid by Douglas Smith for the calendar year 1924 in the sum of $68,187.74, in and by which claim for refund plaintiffs claimed that they were entitled to the refund of said income taxes for the calendar year 1924 which had been illegally and forcibly collected from the said Douglas Smith in his lifetime by reason of the inclusion in his net taxable income for said year of the said net taxable income of said five trusts, as hereinabove set out; that on, to-wit, November 29, 1929, said claim for refund was disallowed in full by the Commissioner of Internal Revenue on a schedule dated the day and year last aforesaid, and plaintiffs were notified of said disallowance by the Commisisoner of Internal Revenue by a letter dated, to-wit, November 29, 1928;

19. That by reason of the premises, the defendant, Mabel G. Reinecke, then and there became indebted to and obligated to pay to the said Douglas Smith the said sum of $59,896.51, of which the said Douglas Smith was then and there most wrongfully deprived by the defendant, in the manner and form set forth, together with interest thereon at the rate of 6% per annum from the date when said taxes were paid, and being so indebted, in consideration thereof, the defendant herein then and there undertook and faithfully promised the said Douglas Smith to pay to him the said sum of $59,896.51, together with interest thereon at the rate of six per cent (6%) per annum from the date when said taxes were paid; that

nevertheless the defendant, though often thereunto requested by the said Douglas Smith during his lifetime and thereafter by the plaintiffs as the duly qualified Executors of his Last Will and Testament, has not paid to the said Douglas Smith during his lifetime or to the plaintiffs or to either of them, since the death of the said Douglas Smith the said sum of money or the interest thereon or any part thereof, but wholly refuses so to do, to the damage of the plaintiffs as such Executors, as aforesaid, in the sum of Fifty-nine Thousand
14½ Eight Hundred Ninety-Six and 51/100 ($59,896.51) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid.

Second Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if set out at length herein the first fifteen (15) paragraphs, inclusive, of the First Count hereof and here now further aver and show:

2. That Section 219 of the Revenue Act of 1924, as applied to the facts herein stated, in so far as said section required or requires or has or may be construed to require that the net taxable income of said five trusts for said period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $159,240.61 be included in the net taxable income of the said Douglas Smith, the grantor of said trusts, for the calendar year 1924, and Sections 210 and 211 of the Revenue Act of 1924 in conjunction with the said Section 219 of said Act, as applied to the facts herein stated, in so far as said sections required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of said five trusts for the aforesaid period from January 1, 1924 to, to-wit, October 22, 1924, in the said sum of $159,240.61, or on any part thereof, as being part of his income for the calendar year 1924 and hence taxable to him, personally, were and are ultra vires, unconstitutional, invalid and of no force and effect; that said Sections 210, 211 and 219 of the Revenue Act of 1924 in so far as the same required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of said five trusts for the said period from January 1, 1924, to, to-wit, October 22, 1924 in the said sum of $159,-240.61, or on any part thereof, as aforesaid, levied and levy

a direct tax upon the said Douglas Smith which was not
15 and is not apportioned among the several states according to their respective numbers and was not and is not laid in proportion to the census or enumeration as was and is required by Clause Third of Section 2 of Article I, and by Clause Fourth of Section 9 of said Article I of the Constitution of the United States of America and said sections of the Revenue Act of 1924 in that respect are ultra vires and exceed the limitations placed upon the power and authority of Congress by said Clause Third of Section 2 and Clause Fourth of Section 9 of Article I of the said Constitution of the United States; that said Sections 210, 211 and 219 in so far as they required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of said five trusts, as aforesaid, exceeded and exceed the power and authority conferred on Congress by the Sixteenth Amendment to the Constitution of the United States, and in imposing or levying a tax upon the said Douglas Smith for and upon the said net taxable income of said five trusts, as aforesaid, said sections deprived and deprive the said Douglas Smith of his property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States; that for these and other reasons said Sections 210, 211 and 219 of the Revenue Act of 1924, in so far as they required or require or have been or may be construed to require the payment of income taxes by the said Douglas Smith, as aforesaid, were and are, as applied to the facts herein stated, ultra vires, unconstitutional, invalid and of no force and effect;

3. That the collection from the said Douglas Smith by the defendant, Mabel G. Reinecke, under protest and duress, of said income taxes for the calendar year 1924 in the said sum of $121,255.95, as aforesaid, to the extent of the said sum of $59,896.51 assessed and collected from the said Douglas Smith
upon and by reason of the inclusion in his said income
16 tax return of the said net taxable income of said five trusts in the sum of $159,240.61, was arbitrary, unauthorized, illegal and without warrant of law;

4. That on, to-wit, May 16, 1929, these plaintiffs, as the Executors of the Last Will and Testament of Douglas Smith, Deceased, within the time prescribed therefor by law, filed with the then Collector of Internal Revenue for the First Collection District of Illinois, at Chicago, Illinois, their duly executed claim for refund of income taxes paid by Douglas Smith

for the calendar year 1924 in the sum of $68,187.74, in and by which claim for refund plaintiffs claimed that they were entitled to the refund of said income taxes for the calendar year 1924 which had been illegally and forcibly collected from the said Douglas Smith in his lifetime by reason of the inclusion in his net taxable income for said year of the said net taxable income of said five trusts, as hereinabove set out; that on, to-wit, November 29, 1929, said claim for refund was disallowed in full by the Commissioner of Internal Revenue on a schedule dated the day and year last aforesaid, and plaintiffs were notified of said disallowance by the Commissioner of Internal Revenue by a letter dated, to-wit, November 29, 1929;

5. That by reason of the premises, the defendant, Mabel G. Reinecke, then and there became indebted to and obligated to pay to the said Douglas Smith the said sum of $59,896.51, of which the said Douglas Smith was then and there most wrongfully deprived by the defendant, in the manner and form set forth, together with interest thereon at the rate of six per cent (6%) per annum from the date when said taxes were paid, and being so indebted, in consideration thereof, the defendant herein then and there undertook and faithfully promised the said Douglas Smith to pay to him the said sum of $59,896.61, together with interest thereon at the rate of six per cent (6%) per annum from the date when said taxes were paid; that nevertheless the defendant, though often therunto requested by the said Douglas Smith during his
17 lifetime and thereafter by the plaintiffs as the duly qualified Executors of his Last Will and Testament, has not paid to the said Douglas Smith during his lifetime or to the plaintiffs or to either of them, since the death of the said Douglas Smith, the said sum of money or the interest thereon or any part thereof, but wholly refuses so to do, to the damage of the plaintiffs as such Executors, as aforesaid, in the sum of Fifty-nine Thousand Eight Hundred Ninety-six and 51/100 ($59,896.51) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid.

Third Count.

1. Plaintiffs here now incorporate in this count by reference thereto and respect as if herein set out at length the first three (3) paragraphs, inclusive, of the First Count hereof and here now further aver and show:

2. That on or about, to-wit, October 30, 1922, in the City

of Chicago and State of Illinois, the said Douglas Smith, a resident of said City, and a citizen of the United States, by a trust indenture on that day and at the place aforesaid duly executed by him as grantor, and by himself, the said Kenneth G. Smith, and Foreman Bros. Banking Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois (now Foreman-State Trust and Savings Bank) as trustees, established a trust known as the General Trust for the benefit of his wife, Emaroy J. Smith, his two daughters, June Keither Slater and Florence Gifford Ellis, and his son, Kenneth G. Smith, hereinafter sometimes referred to as the beneficiaries under said trust; that in and by said trust indenture the said Douglas Smith, Kenneth G. Smith and Foreman Bros. Banking Company were constituted the trustees of the trust thereby established; that at the time of the establishment of said trust and from thence continuously to and including October 22, 1924, Foreman Bros.
18 Banking Company (later during said period known as Foreman-State Trust and Savings Bank, by which name it is still known) was an Illinois corporation duly authorized to act as a trustee of said trust, and the said Douglas Smith and Kenneth G. Smith were each of them citizens of Illinois, of full age and lawfully qualified to act as trustees of said trust;

3. That in and by the said trust indenture establishing the General Trust as above set out, the grantor, Douglas Smith, conveyed and assigned to the trustees thereof five hundred thirty-nine (539) shares of the common capital stock of the Pepsodent Company, an Illinois corporation, and provided that the same should be held and managed by said trustees and that out of the net income of said trust they should pay Three Thousand Dollars ($3,000) a month to Emaroy J. Smith Nine Hundred Dollars ($900) a month each to June Keith Slater and Florence Gifford Ellis, during their respective lives, or, in the case of the said Emaroy J. Smith, until the property held by said trustees in the Emaroy Trust, another trust which had theretofore been created by the said Douglas Smith for the benefit of his wife, the said Emaroy J. Smith, should amount in value to Five Hundred Thousand Dollars ($500,000.00), and in the case of the said June Keith Slater and Florence Gifford Ellis respectively, the property held by said trustees in the June and Florence Trusts, two other trusts which had been theretofore created by the said Douglas Smith for the benefit respectively of the said June Keith

Slater and Florence Gifford Ellis should amount in the case of each trust respectively, to the sum of Three Hundred Thousand Dollars ($300,000.00), said sums so to be paid to the said Emaroy, June and Florence out of the net income of said General Trust to be abated and diminished proportionately in the event the net income thereof should prove insufficient to pay the full amounts of income as therein directed, and that the said net income of the said General Trust in excess of the sums so to be paid to the said beneficiaries thereof should
19 be paid five-elevenths (5/11) thereof to the aforesaid Emaroy Trust and three-elevenths (3/11) thereof to each of the aforesaid June and Florence Trusts, the said payments to continue until the full principal of the Emaroy, June and Florence Trusts had been established in the amount hereinabove set out; that in and by said trust indenture establishing the General Trust, the grantor provided that in the event of the death of the said wife of the grantor or of either of his said daughters, no further payment should be made to the separate trusts, either the said Emaroy, June or Florence Trusts created as above set out for the benefit of such person so dying but the payments of income which were to be made under the provisions of said General Trust indenture to said separate trusts should be apportioned between the said separate trusts created for the survivors of the said three beneficiaries of the said General Trust, that in case of the death of either of said daughters of Douglas Smith leaving children her surviving, a portion of the principal of the said General Trust should thereupon be set aside in value sufficient, when added to the value of the principal of the separate trusts created, as above set out, for the benefit of the daughters so dying, to make up a total of $300,000.00, said portion of said principal to be known as the Supplemental Fund, that the income from said Supplemental Fund should be paid to the children of the daughter so dying. in equal shares during their lives until they respectively arrive at the age of twenty-one (21) years, and that upon their respectively reaching that age, the principal from which they should then be receiving said income should be delivered to them respectively as their absolute property; that in and by said trust indenture establishing the General Trust the grantor further provided that upon the establishment of the full principal of the said Emaroy, June and Florence Trusts, as above set out, or their prior termination, the principal of the said General Trust, ex-
20 cept said Supplemental Fund or Funds, should be delivered to the Kenneth Trust, another trust theretofore cre-

ated by the said Douglas Smith for the benefit of Kenneth C. Smith, his son, or if the said Kenneth G. Smith had then attained the age of forty (40) years, (at which time the said Kenneth Trust terminated under its terms) said principal should be delivered to the said Kenneth G. Smith as his absolute property, or, if he was then not living, to such other persons as were entitled to the principal of the said Kenneth Trust under the terms thereof;

4. That in said trust indenture establishing the said General Trust it was provided that in the case of refusal or inability of a trustee to act or in the case of the death of a trustee, the remaining trustees had the authority and duty to appoint a successor trustee, providing, however, that one trustee always should be a bank or trust company of the City of Chicago; that said trust indenture establishing the said General Trust contained a provision in the words as follows:

"Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors.";

5. That a true and correct copy of the said trust indenture containing the provisions of the General Trust is attached hereto and marked Exhibit "E" and said copy of said trust indenture and the provisions therein contained are by this reference incorporated herein and made a part hereof as fully as if herein set out at length;

6. That under the terms of the trust indenture establishing the said General Trust and the said Kenneth, Emaroy, June and Florence Trusts, the said Douglas Smith was not a beneficiary of said trusts, or any of them, either as to the principal or the income thereof; that the said Douglas Smith had no control over said trusts or any of them except as
21 one of the three trustees thereof; that except as one of said three trustees, he had no title to the principal of said trusts or of any of them and had no right to receive the same or dispose of it; that except as one of said three trustees, he was not entitled to the income of said trusts or any part thereof, or entitled to receive the same or to dispose of it or any part thereof, and had no right, title or authority to receive, hold or dispose of the same or any part thereof except as directed by said trust indentures respectively; that throughout the period of the existence of said trusts, the said Douglas Smith in fact never received, directly or indirectly, to his own use or his own benefit, any of the income thereof and never exercised any control over the same;

7. That the said General Trust and the said Kenneth, Emaroy, June, and Florence Trusts continued to exist under the terms of their said trust indentures respectively, in the manner above set out, from the respective dates of the establishment of said trusts continuously until, to-wit, October 22, 1924, when the said trust instrument establishing the said General Trust was modified by a separate writing, duly executed by the said Douglas Smith and the other two trustees of said trust, wherein and whereby the said Douglas Smith resigned as trustee of said General Trust and wherein and whereby the remaining trustees appointed a third person, therein named, to succeed him as such trustees; that in and by said modification, the provision contained in said trust indenture establishing the said General Trust that said trust might be revoked or modified by a writing signed by the said Douglas Smith and one of the other two trustees thereof, as above set out, was so altered that said trust was not thereafter revocable or subject to modification by the said Douglas Smith, either acting alone or in conjunction with any other person;

8. That during the period from January 1, 1924, to, to-wit, the 22nd day of October of said year, being the date
22 of the execution of the aforesaid modification of said trust indenture establishing the General Trust, as hereinabove set out, the net taxable income of the said General Trust amounted to the sum of $110,495.00; that having theretofore on or about, to-wit, March 14, 1925, filed a tentative income tax return for the calendar year 1924, in which was set out an estamted income tax for said year in the sum of $64,000.00 which did not include any income tax upon or by reason of the said net taxable income of said General Trust for said period or upon or by reason of any part thereof, the said Douglas Smith on or about, to-wit, May 14, 1925, filed with the defendant, Mabel G. Reinecke, the then Collector of Internal Revenue, at Chicago, Illinois, his individual income tax return for the said calendar year 1924 and included in his said individual income tax return, at Item 9 (b) therein, the aforesaid net taxable income of the said General Trust in the aforesaid sum of $110,495.00; that the said net taxable income of said General Trust for said period in said amount was included by the said Douglas Smith in his said income tax return involuntarily and under protest and duress; that said protest was duly filed in writing by the said Douglas Smith with his said return;

9. That the income taxes due to the United States upon the net taxable income for the calendar year 1924, as set out in the said individual return of income so filed by the said Douglas Smith as aforesaid, including the aforesaid net taxable income of the said General Trust in the said sum of $110,495.00 was the sum of $121,255.95; that the said income tax in said amount was assessed against the said Douglas Smith and was by him involuntarily and under protest and duress and to avoid threatened penalties and distraint of his property, paid to the defendant, the said Mabel G. Reinecke, the then Collector of Internal Revenue of the United States for the First Collection District of Illinois at Chicago, Illinois, in installments as follows, that is to say, on March 14, 1925, $16,000; on May 13, 1924, $14,313.99; on June 12, 1925, $30,313.99; on September 14, 1925, $30,313.98, and on December 14, 1925, $30,313.99; that of the said income taxes for the year 1924 in the said sum of $121,255.95 so assessed against the said Douglas Smith and by him under protest and duress paid to the defendant, Mabel G. Reinecke, as aforesaid, the sum of $41,860.63 was assessed against him and by him involuntarily paid to the defendant, as above set out, upon and by reason of the aforesaid net taxable income of the said General trust for the period aforesaid in the said sum of $110,495.00, which was by him included in his said individual return of income for the year 1924 under protest and duress, as hereinabove set out;

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10. That the Revenue Act of 1924 was enacted and became a law on June 2, 1924; that Section 219, paragraph (g), of that Act provided as follows:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

11. That the said Douglas Smith never, directly or indirectly, received any of the aforesaid net income of the said General Trust in the said sum of $110,495.00 upon which he was required to and did pay income taxes to the defendant in the said sum of $41,860.63, as aforesaid, other than as one of the three trustees of said General Trust and of said Emaroy, June and Florance Trusts; that throughout the period from January 1, 1924, to, to-wit, October 22, 1924, the said Douglas Smith alone had no power to revoke the said Gen-

eral Trust or to revest in himself title to any part of the corpus of said trust, but the said General Trust could be revoked by him and he could revest in himself title to the corpus of said trust only with the consent of one of the other two trustees thereof, namely, the said Kenneth G. Smith and Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company); that the said General Trust remained in existence unrevoked throughout the period from January 1, 1924, to, to-wit, October 22, 1924, as aforesaid, and immediately upon the receipt during said period, of the said income of the said General Trust or any part thereof, said income forthwith belonged to the said General Trust and the beneficiaries thereof in accordance with the terms of its trust indenture; that said income was in fact distributed by said trustees to and was received and retained by the beneficiaries of said General Trust to their own separate use and benefit in accordance with the provisions of its trust indenture; that the income of the said General Trust was not the income of the said Douglas Smith, was never received by him, directly or indirectly, to his own use and benefit, and could not legally be taxed to him;

12. That during the said period from January 1, 1924, to, to-wit, October 22, 1924, and prior and subsequent thereto, and under the express provision made therefor in the trust indenture of said General Trust, the said Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company) was entitled to receive compensation from said trust as one of the trustees thereof, and upon becoming trustee thereof as aforesaid and in all its acts as a trustee of said trust, said Foreman-State Trust and Savings Bank was a representative of and was acting for the beneficiaries of said General Trust; that the said Kenneth G. Smith, as one of the trustees of the said General Trust, was likewise during said period and prior and subsequent thereto entitled to compensation from said General Trust, and was a representative of and was acting for the said beneficiaries thereof; that in addition, the said Kenneth G. Smith in his individual capacity was otherwise a beneficiary of the said General Trust under the terms of its said trust indenture; that at no time during the year 1924 did Douglas Smith, the grantor of said General Trust, have power to revest in himself title to any part of the corpus of said trust without the consent of a beneficiary thereof;

13. That the collection from the said Douglas Smith by the defendant, Mabel G. Reinecke, under protest and

duress, as aforesaid, of said income taxes, for the calendar year 1924 in the said sum of $121,255.95, as aforesaid, to the extent of the said sum of $41,860.63, assessed and collected from the said Douglas Smith upon and by reason of the inclusion in his income tax return of the said net taxable income of the said General Trust in the said sum of $110,495.00, as above set out, was arbitrary, unauthorized, illegal and without warrant of law;

14. That on, to-wit, May 16, 1929, these plaintiffs as the executors of the last Will and Testament of Douglas Smith, Deceased, within the time prescribed therefor by law, filed with the then Collector of Internal Revenue for the First Collection District of Illinois, at Chicago, Illinois, their duly executed claim for refund of income taxes paid by Douglas Smith for the calendar year 1924 in the sum of $68,187.74, in and by which claim for refund, plaintiffs claimed the refund of said income taxes for the calendar year 1924, which had been illegally and forcibly collected from the said Douglas Smith in his lifetime, in the said sum of $41,860.63, by reason of the inclusion in his net taxable income for said year of the net taxable income of the said General Trust for the period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $110,495.00, as hereinabove set out; that on, to-wit, November 29, 1929, said claim for refund was disallowed in full by the Commissioner of Internal Revenue on a schedule dated the day and year last aforesaid, and plaintiffs were notified of said disallowance by the Commissioner of Internal Revenue by a letter dated, to-wit, November 29, 1929;

15. That by reason of the premises, the defendant, Mabel G. Reinecke, then and there became indebted to and obligated to pay to the said Douglas Smith the said sum of $41,860.63, of which the said Douglas Smith was then and there most wrongfully deprived by the defendant, in the manner and
26 form set forth, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid, and being so indebted, in consideration thereof, the defendant herein then and there undertook and faithfully promised the said Douglas Smith to pay to him the said sum of $41,860.63, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; that nevertheless the defendant, though often thereunto requested by the said Douglas Smith during his lifetime and thereafter by the plaintiffs as the duly qualified Executors of his Last Will and Testament, has not paid to the said Douglas

Smith during his lifetime or to the plaintiffs or to either of them, since the death of the said Douglas Smith, the said sum of money or the interest thereon or any part thereof, but wholly refuses so to do, to the damage of the plaintiffs as such Executors, as aforesaid, in the sum of Forty-one Thousand Eight Hundred Sixty and 63/100 ($41,860.63) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid.

Fourth Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first eleven paragraphs, inclusive, of the Third Count hereof, and here now further aver and show:

2. That Section 219 of the Revenue Act of 1924, as applied to the facts herein stated, in so far as said section required or requires or has or may be construed to require that the net taxable income of the General Trust for said period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $110,495.00 be included in the net taxable income of the said Douglas Smith, the grantor of said trusts, for the calendar year 1924, and Sections 210 and 211 of the Revenue Act of 1924 in conjunction with the said Section 219 of said Act, as applied to the facts herein stated, in so far as said sec-
27 tions required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the General Trust for the aforesaid period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $110,495.00, or on any part thereof, as being part of his income for the calendar year 1924 and hence taxable to him, personally, were and are ultra vires, unconstitutional, invalid and of no force and effect; that said Sections 210, 211 and 219 of the Revenue Act of 1924 in so far as the same required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the General Trust for the said period from January 1, 1924, to, to-wit, October 22, 1924 in the said sum of $110,495.00, or on any part thereof, as aforesaid, levied and levy a direct tax upon the said Douglas Smith which was not and is not apportioned among the several States according to their respective numbers and was not and is not laid in proportion to the census or enumeration as was

and is required by Clause Third of Section 2 of Article I and by Clause Fourth of Section 9 of said Article I of the Constitution of the United States of America and said sections of the Revenue Act of 1924 in that respect are ultra vires and exceed the limitations placed upon the power and authority of Congress by said Clause Third of Section 2 and Clause Fourth of Section 9 of Article I of said Constitution of the United States; that said Sections 210, 211 and 219 in so far as they required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the General Trust, as aforesaid, exceeded and exceed the power and authority conferred on Congress by the Sixteenth Amendment to the Constitution of the United States, and in imposing or levying a tax upon the said Douglas Smith for and upon the said net taxable income of the General Trust, as afore-
28 said, said sections deprived and deprive the said Douglas Smith of his property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States; that for these and other reasons said Sections 210, 211 and 219 of the Revenue Act of 1924, in so far as they required or require or have been or may be construed to require the payment of income taxes by the said Douglas Smith, as aforesaid, were and are, as applied to the facts herein stated, ultra vires, unconstitutional, invalid and of no force and effect;

3. Plaintiffs here now incorporate in this count by reference thereto and repeat as if set out at length herein Paragraphs 13, 14, and 15 of said Third Count of this Decloration.

Fifth Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first three (3) paragraphs inclusive, of the First Count hereof and here now further aver and show:

2. That on or about, to-wit, September 25, 1922, in the City of Chicago and State of Illinois, the said Douglas Smith, a resident of said City, and a citizen of the United States, by a trust indenture on that day and at the place aforesaid duly executed by him as grantor and by himself, the said Kenneth G. Smith, and Foreman Bros. Banking Company, a corporation organized and existing under and by virtue of the laws

of the State of Illinois (now Foreman-State Trust and Savings Bank), as trustees, established a trust known as the Kenneth Trust for the benefit of his son, Kenneth G. Smith, hereinafter sometimes referred to as the beneficiary under said trust; that in and by said trust indenture the said Douglas Smith, Kenneth G. Smith and Foreman Bros. Banking Company were constituted the trustees of the trust thereby established; that at the time of the establishment of said trust and from thence continuously to and including October
29 22, 1924, Foreman Bros. Banking Company (later during said period known as The Foreman Trust and Savings Bank, now Foreman-State Trust and Savings Bank) was an Illinois corporation duly authorized to act as a trustee of said trust, and the said Douglas Smith and Kenneth G. Smith were each of them citizens of Illinois, of full age and lawfully qualified to act as trustees of said trust;

3. That in and by the said trust indenture establishing the Kenneth Trust, as above set out, the grantor, Douglas Smith conveyed and assigned to the Trustees thereof one hundred (100) shares of the common capital stock of the Pepsodent Company, an Illinois corporation and provided that the same should be held and managed by the said trustees and the net income thereof paid to the said Kenneth G. Smith in monthly installments until he attained the age of forty (40) years at which time the principal of said trust should be delivered to him as his absolute property, that in case of the death of Kenneth G. Smith prior to his attaining the said age of forty (40) years the said principal should be paid over and delivered as the said Kenneth G. Smith might by Will appoint, that in default of such appointment if he should die leaving issue and/or a widow, said principal should be divided between them in the proportions therein set out, but if the said Kenneth G. Smith should die leaving a widow and no issue, then one-third (1/3) of said principal should go to such widow and two-thirds (2/3) thereof should be divided equally between the June Trust and the Florence Trust, two other trusts which had been established by the said Douglas Smith for the benefit respectively of his daughters, June Keith Slater and Florence Gifford Ellis, at the same time that he established the said Kenneth Trust, as aforesaid, and that if the said Kenneth G. Smith should die leaving no issue and no widow, the whole of said principal should be divided equally between the said June and Florence Trusts;

4. That in said trust indenture establishing the said Ken-

neth Trust it was provided that in the case of the death
30 of a trustee, the remaining trustees had the authority and duty to appoint a successor trustee, providing, however, that one trustee always should be a bank or trust company of the City of Chicago; that said trust indenture establishing the said Kenneth Trust contained a provision in the words as follows:

"Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors.";

5. That true and correct copy of the said trust indenture containing the provisions of the said Kenneth Trust is attached hereto and marked Exhibit "D" and said copy of said trust indenture and the provisions therein contained are by this reference incorporated herein and made a part hereof as fully as if herein set out at length;

6. That under the terms of the trust indenture establishing the said Kenneth Trust, and the said June and Florence Trusts, the said Douglas Smith was not a beneficiary of said trusts, or any of them, either as to the principal or the income thereof; that the said Douglas Smith had no control over said trusts or any of them except as one of the said three trustees thereof; that except as one of said three trustees, he had no title to the principal of said trusts or of any of them, and had no right to receive the same or dispose of it; that except as one of said three trustees he was not entitled to the income of said trusts, or any part thereof, or entitled to receive the same or to dispose of it or any part thereof; and had no right, title or authority to receive, hold or dispose of the same or any part thereof except as directed by said trust indentures respectively; that throughout the period of the existence of said trusts, the said Douglas Smith, in fact, never received, directly or indirectly, to his own use or for his own benefit, any of the income thereof, and never exercised any control over the same;

7. That the said Kenneth Trust and the said June and
31 Florence Trusts continued to exist under the terms of their said trust indentures, respectively, in the manner above set out, from the respective dates of the establishment of said trusts continuously until, to-wit, October 22, 1924, when the said trust instrument establishing the said Kenneth Trust was modified by a separate writing, duly executed by the said Douglas Smith and the other two trustees of said

trust, wherein and whereby the said Douglas Smith resigned as trustee of the said Kenneth Trust and wherein and whereby the remaining trustees appointed a third person therein named to succeed him as such trustee; that in and by said modification the provision contained in said trust indenture establishing the said Kenneth Trust, that the said trust might be revoked or modified by a writing signed by the said Douglas Smith and one of the other two trustees thereof, as above set out, was so altered that said trust was not thereafter revocable or subject to modification by the said Douglas Smith, either acting alone or in conjunction with any other person;

8. That during the period from January 1, 1924, to, to-wit, the 22d day of October of said year, being the date of the execution of the aforesaid modification of said trust indenture establishing the Kenneth Trust, as herein above set out, the net taxable income of the said Kenneth Trust amounted to the sum of $20,500.00; that having theretofore on or about, to-wit, March 14, 1925, filed a tentative income tax return for the calendar year 1924, in which was set out an estimated income tax for said year in the sum of $64,000.00 which did not include any income tax upon or by reason of the said net taxable income of the said Kenneth Trust for said period, or upon or by reason of any part thereof, the said Douglas Smith on or about, to-wit, May 14, 1925, filed with the defendant, Mabel G. Reinecke, the then Collector of Internal Revenues, at Chicago, Illinois, his individual income tax return for
32 the said calendar year 1924, and included in his said individual income tax return, at Item 9 (b) therein, the aforesaid net taxable income of the said Kenneth Trust in the aforesaid sum of $20,500.00; that the said net taxable income of the said Kenneth Trust for said Period in said amount was included by the said Douglas Smith in his said income tax return involuntarily and under protest and duress; that said protest was duly filed in writing by the said Douglas Smith with his said return;

9. That the income taxes due to the United States upon the net taxable income for the calendar year 1924, as set out in the said individual return of income so filed by the said Douglas Smith, as aforesaid, including the aforesaid net taxable income of the said Kenneth Trust in the said sum of $20,500.00 was the sum of $121,255.95; that said income taxes in said amount was assessed against the said Douglas Smith and was by him, involuntarily and under protest and duress, and to avoid threatened penalties and distrain of his property,

paid to the defendant, the said Mabel G. Reinecke, the then Collector of Internal Revenue of the United States for the First Collection District of Illinois, at Chicago, Illinois, in installments as follows, that is to say, on March 14, 1925, $16,000; on May 13, 1925, $14,313.99; on June 12, 1925, $30,313.99; on September 14, 1925, $30,313.98; and on December 14, 1925, $30,313.99; that of the said income taxes for the year 1924 in the said sum of $121,255.95 so assessed against the said Douglas Smith and by him under protest and duress paid to the defendant, Mabel G. Reinecke, as aforesaid, the sum of $7,790.00 was assessed against him and by him involuntarily paid to the defendant, as above set out, upon and by reason of the aforesaid net taxable income of the said Kenneth Trust for the period aforesaid in the said sum of $20,500.00, which was by him included in his said individual return of income for the year 1924, under protest and duress, as hereinabove set out;

10. That the Revenue Act of 1924 was enacted and be-
33 came a law on June 2, 1924; that Section 219, paragraph (g), of that Act provided as follows:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.";

11. That the said Douglas Smith never directly or indirectly received any of the aforesaid net income of the said Kenneth Trust in the said sum of $20,500.00 upon which he was required to and did pay income taxes to the defendant in the said sum of $7,790.00, as aforesaid, other than as one of the three trustees of the said Kenneth Trust; that throughout the period from January 1, 1924, to, to-wit, October 22, 1924, the said Douglas Smith alone had no power to revoke the said Kenneth Trust or to revest in himself title to any part of the corpus of said trust, but the said Kenneth Trust could be revoked by him and he could revest in himself title to the corpus of said trust only with the consent of one of the two other trustees thereof, namely, the said Kenneth G. Smith and Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company); that the said Kenneth Trust remained in existence unrevoked throughout the period from January 1, 1934, to, to-wit, October 22, 1924, as aforesaid, and immediately upon the receipt during said period of the said income of the said Kenneth Trust, or any part thereof, said

income forthwith belonged to the said Kenneth Trust and to the beneficiary thereof in accordance with the terms of its trust indenture; that the said income was, in fact, distributed by said trustees to and was received by the said Kenneth G. Smith, the beneficiary of the said Kenneth Trust, to his own separate use and benefit in accordance with the provisions of the trust indenture establishing the same, as hereinabove
34 set out; that the income of the said Kenneth Trust was not the income of the said Douglas Smith, was never receivel by him, directly or indirectly, to his own use and benefit, and could not legally be taxed to him;

12. That during the said period from January 1, 1924 to, to-wit, October 22, 1924, and prior and subsequent thereto, and under the express provisions made therefor in the trust indenture of said Kenneth Trust, the said Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company) was entitled to receive compensation from said trust as one of the trustees thereof, and upon becoming a trustee thereof as aforesaid and in all its acts as a trustee of said trust, said Foreman-State Trust and Savings Bank was a rep-representative of and was acting for the beneficiaries of said Kenneth Trust; that the said Kenneth G. Smith, as one of the trustees of the said Kenneth Trust was likewise during said period and prior and subsequent thereto entitled to compensation from said Kenneth Trust, and was a representative of and was acting for the said beneficiaries thereof; that in addition, the said Kenneth G. Smith in his individual capacity was otherwise a beneficiary of the said Kenneth Trust under the terms of its trust indenture; that at no time during the year 1924 did Douglas Smith, the grantor of said Kenneth Trust, have power to revest in himself title to any part of the corpus of said trust without the consent of a beneficiary thereof;

13. That the collection from the said Douglas Smith by the defendant, Mabel G. Reinecke, under protest and duress, as aforesaid, of said income taxes, for the calendar year 1924 in the said sum of $121,255.95, as aforesaid, to the extent of the said sum of $7,790.00, assessed and collected from the said Douglas Smith upon and by reason of the inclusion in his income tax return of the said net taxable income of the said Kenneth Trust in the said sum of $20,500.00, a above set out, was arbitrary, unauthorized, illegal and without warrant of law;

14. That on, to-wit, May 16, 1929, these plaintiffs as
35 the Executors of the Last Will and Testament of Douglas Smith, Deceased, within the time prescribed therefor by law, filed with the then Collector of Internal Revenue for the First Collection District of Illinois, at Chicago, Illinois, by their duly executed claim for refund of income taxes paid by Douglas Smith for the calendar year 1924 in the sum of $68,-187.74, in and by which claim for refund, plaintiffs claimed the refund of said income taxes for the calendar year 1924, which had been illegally and forcibly collected from the said Douglas Smith in his lifetime, in the said sum of $7,790.00, by reason of the inclusion in his net taxable income for said year of the net taxable income of the said Kenneth Trust for the period from January 1, 1924 to, to-wit, October 22, 1924, in the said sum of $20,500.00, as hereinabove set out; that on, to-wit, November 29, 1929, said claims for refund was disallowed in full, by the Commissioner of Internal Revenue on a schedule dated the day and year last aforesaid, and plaintiffs were notified of said disallowance by the Commissioner of Internal Revenue by letter dated, to-wit, November 29, 1929;

15. That by reason of the premises, the defendant, Mabel G. Reinecke, then and there became indebted to and obligated to pay to the said Douglas Smith the said sum of $7,790.00 of which the said Douglas Smith was then and there most wrongfully deprived by the defendant, in the manner and form set forth, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; and being so indebted, in consideration thereof, the defendant herein then and there undertook and faithfully promised the said Douglas Smith to pay to him the said sum of $7,790.00, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; that nevertheless the defendant, though often thereunto requested by the said Douglas Smith during his lifetime and thereafter by the plaintiffs as the duly qualified Executors of his last Will and Testament, has not paid to the said Douglas Smith dur-
36 ing his lifetime or to the plaintiffs or to either of them, since the death of the said Douglas Smith, the said sum of money or the interest thereon or any part thereof, but wholly refuses so to do, to the damage of the plaintiffs as such Executors, as aforesaid, in the sum of Seven Thousand Seven Hundred Ninety ($7,790) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid.

Sixth Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first eleven paragraphs, inclusive, of the Fifth Count hereof, and here now further aver and show:

2. That Section 219 of the Revenue Act of 1924, as applied to the facts herein stated, in so far as said section required or requires or has or may be construed to require that the net taxable income of the Kenneth Trust for said period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $20,500.00 be included in the net taxable income of the said Douglas Smith, the grantor of said trusts, for the calendar year 1924, and Sections 210 and 211 of the Revenue Act of 1924 in conjunction with the said Section 219 of said Act, as applied to the facts herein stated, in so far as said sections required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the Kenneth Trust for the aforesaid period from January 1, 1924 to, to-wit, October 22, 1924, in the said sum of $20,500.00, or on any part thereof, as being part of his income for the calendar year 1924 and hence taxable to him personally, were and are ultra vires, unconstitutional, invalid and of no force and effect; that said Sections 210, 211 and 219 of the Revenue Act of 1924 in so far as the same required or require or have been or may be construed to require that the said Douglas Smith pay income
37 taxes to the United States upon the said net taxable income of the Kenneth Trust for the said period from January 1, 1924 to, to-wit, October 22, 1924 in the said sum of $20,500.00, or on any part thereof, as aforesaid, levied and levy a direct tax upon the said Douglas Smith which was not and is not apportioned among the several States according to their respective numbers and was not and is not laid in proportion to the census or enumeration as was and is required by Clause Third of Section 2 of Article I and by Clause Fourth of Section 9 of said Article I of the Constitution of the United States of America and said sections of the Revenue Act of 1924 in that respect are ultra vires and exceed the limitations placed upon the power and authority of Congress by said Clause Third of Section 2 and Clause Fourth of Section 9 of Article I of said Constitution of the United States; that said Sections 210, 211 and 219 in so far as they required or require or have been or may be construed to require that the

said Douglas Smith pay income taxes to the United States upon the said net taxable income of the Kenneth Trust, as aforesaid, exceeded and exceed the power and authority conferred on Congress by the Sixteenth Amendment to the Constitution of the United States, and in imposing or levying a tax upon the said Douglas Smith for and upon the said net taxable income of the Kenneth Trust, as aforesaid, said sections deprived and deprive the said Douglas Smith of his property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States; that for these and other reasons said Sections 210, 211, and 219 of the Revenue Act of 1924, in so far as they required or require or have been or may be construed to require the payment of income taxes by the said Douglas Smith, as aforesaid, were and are, as applied to the facts herein stated, ultra vires, unconstitutional, invalid and of no force and effect;

3. Plaintiffs here incorporate in this count by reference thereto and repeat as if set out at length herein Paragraphs 13, 14 and 15 of said Fifth Count of this Declaration.

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Seventh Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first three (3) paragraphs, inclusive, of the First Count hereof and here now further aver and show:

2. That on or about, to-wit, September 25, 1922, in the City of Chicago and State of Illinois, the said Douglas Smith, a resident of said City, and a citizen of the United States, by a trust indenture on that day and at the place aforesaid duly executed by him as grantor and by himself, the said Kenneth G. Smith, and Foreman Bros. Banking Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois (now Foreman-State Trust and Savings Bank), as trustees, established trust known as the Emaroy Trust for the benefit of his wife, Emaroy J. Smith, hereinafter sometimes referred to as the beneficiary under said trust; that in and by said trust indenture the said Douglas Smith, Kenneth G. Smith and Foreman Bros. Banking Company were constituted the trustees of the trust thereby established; that at the time of the establishment of said trust and from thence continuously to and including October 22, 1924, Foreman Bros. Banking Company (later during said period

known as The Foreman Trust and Savings Bank, now Foreman-State Trust and Savings Bank) was an Illinois corporation duly authorized to act as a trustee of said trust, and the said Douglas Smith and Kenneth G. Smith were each of them citizens of Illinois, of full age and lawfully qualified to act as trustees of said trust;

3. That in and by the said trust indenture establishing the Emaroy Trust, as above set out, the grantor, Douglas Smith, conveyed and assigned to the trustees thereof fifty (50) shares of the common capital stock of the Pepso-
39 dent Company, an Illinois corporation, and provided that the same should be held and managed by said trustees and that the income therefrom and from all other trust property should be by them collected and revested and accumulated until said stock and all said accumulations and additions thereto amounted to the sum of $500,000.00 and thereafter said trustees should pay over the net income of said trust to the said Emaroy J. Smith during her life; that in and by said trust instrument establishing the Emaroy Trust it was further provided that upon the death of the said Emaroy J. Smith the trust should thereupon terminate and the trust property be distributed as the said beneficiary should by will appoint, and that in default of such appointment said trust property should be distributed to the June, Florence and Kenneth Trusts, three other trusts established by the said Douglas Smith for the benefit respectively of his son, Kenneth G. Smith, and his two daughters, June Keith Slater and Florence Gifford Ellis, at the same time the said Emaroy Trust was established, as above set out, in equal shares;

4. That in said trust indenture establishing the said Emaroy Trust it was provided that in the case of the death of a trustee, the remaining trustees had the authority and duty to appoint a successor trustee, providing, however, that one trustee always should be a bank or trust company of the City of Chicago; that said trust indenture establishing the said Emaroy Trust contained a provision in the words as follows:

"Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors.";

5. That a true and correct copy of the said trust indenture containing the provisions of the said Emaroy Trust is

attached hereto and marked Exhibit "A" and said copy of said trust indenture and the provisions therein contained are by this reference incorporated herein and made a part hereof as fully as if herein set out at length;

6. That under the terms of the trust indentures establishing the said Emaroy Trust and the said Kenneth, June and Florence Trusts, the said Douglas Smith is not a beneficiary of said trusts, or any of them, either as to the principal or the income thereof; that the said Douglas Smith had no control over said trusts or any of them, except as one of the three trustees thereof; that except as one of said three trustees, he had no title to the principal of said trusts, or of any of hem, and had no right to receive the same or dispose of it; that except as one of said three trustees he was not entitled to the income of said trusts, or any part thereof, or entitled to receive the same or dispose of it, or any part thereof, and had no right, title or authority to receive, hold, or dispose of the same or any part thereof except as directed by said trust indentures, respectively; that throughout the period of the existence of said trusts, the said Douglas Smith, in fact, never received, directly or indirectly, to his own use or for his own benefit, any of the income thereof, and never exercised any control over the same;

7. That the said Emaroy Trust and the said Kenneth, June and Florence Trusts continued to exist under the terms of their said trust indentures respectively, in the manner above set out, from the date of the establishment of said trusts continuously until, to-wit, October 22, 1924, when the said trust instrument establishing the said Emaroy Trust was modified by a separate writing, said Douglas Smith and the other two trustees of said trust, wherein and whereby the said Douglas Smith resigned as trustee of the said Emaroy Trust and wherein and whereby the remaining trustees appointed a third person therein named to succeed him as such trustee; that in and by said modification, the provision contained in said trust indenture establishing the said Emaroy Trust, as above set out, that the said trust might be revoked or modified by a writing signed by the said Douglas Smith and one of the other two trustees thereof, as above set out, was so altered that said trust was not thereafter revocable or subject to modification by the said Douglas Smith, either acting alone or in conjunction with any other person;

8. That during the period from January 1, 1924, to, to-

wit, the 22d day of October of said year, being the date of the execution of the aforesaid modification of said trust indenture establishing the Emaroy Trust, as hereinabove set out, the net taxable income of the said Emaroy Trust amounted to the sum of $12,794.97; that having theretofore on or about, to-wit, March 14, 1925, filed a tentative income tax return for the calendar year 1924, in which was set out an estimated income tax for said year in the sum of $64,000.00, which did not include any income tax upon or by reason of the said net taxable income of the said Emaroy Trust for said period, or upon or by reason of any part thereof, the said Douglas Smith on or about, to-wit, May 14, 1925, filed with defendant, Mabel G. Reinecke, the then Collector of Internal Revenue, at Chicago, Illinois, his individual income tax return for the said calendar year 1924, and included in his said individual income tax return, at Item 9 (b) therein, the aforesaid net taxable income of the said Emaroy Trust in the aforesaid sum of $12,794.97; that the said net taxable income of the said Emaroy Trust for said period in said amount was included by the said Douglas Smith in his said income tax return involuntarily and under protest and duress; that said protest was duly filed in writing by the said Douglas Smith with his said return;

9. That the income taxes due to the United States upon the net taxable income for the calendar year 1924, as set out in the said individual return of income so filed by the
42 said Douglas Smith, as aforesaid, including the aforesaid net taxable income of the said Emaroy Trust in the said sum of $12,794.97 was the sum of $121,255.95; that said income taxes in said amount were assessed against the said Douglas Smith and were by him involuntarily and under protest and duress, and to avoid threatened penalties and distraint of his property, paid to the defendant, the said Mabel G. Reinecke, the then Collector of Internal Revenue of the United States for the First Collection District of Illinois, at Chicago, Illinois, in installments as follows, that is to say, on March 14, 1925, $16,000.00; on May 13, 1925, $14,313.99; on June 12, 1925, $30,313.99; on September 14, 1925, $30,313.98; and on December 14, 1925, $30,313.99; that of the said income taxes for the year 1924 in the said sum of $121,255.95 so assessed against the said Douglas Smith and by him under protest and duress paid to the defendant, Mabel G. Reinecke, as aforesaid, the sum of $4,862.09 was assessed against him and by him involuntarily paid to the defendant,

as above set out, upon and by reason of the aforesaid not taxable income of the said Emaroy Trust for the period aforesaid in the said sum of $12,794.97, which was by him included in his said individual return of income for the year 1924, under protest and duress, as hereinabove set out;

10. That the Revenue Act of 1924 was enacted and became a law on June 2, 1924; that Section 219, paragraph (g), of that Act provided as follows:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.";

11. That the said Douglas Smith never, directly or indirectly, received any of the aforesaid net income of the said Emaroy Trust in the said sum of $12,794.97 upon which he was required to and did pay income taxes to the defend-
43 ant in the said sum of $4,862.09, as aforesaid, other than as one of the three trustees of the said Trust; that throughout the period from January 1, 1924, to, to-wit, October 22, 1924, the said Douglas Smith alone had no power to revoke the said Emaroy Trust or to revest in himself title to any part of the corpus of said trust; but the said Emaroy Trust could be revoked by him and he could revest in himself title to the corpus of said trust only with the consent of one of the two other trustees thereof, namely, the said Kenneth G. Smith and Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company); that the said Emaroy Trust remained in existence unrevoked throughout the period from January 1, 1924, to, to-wit, October 22, 1924, as aforesaid, and immediately upon the receipt during said period of the same income of the said Emaroy Trust, or of any part thereof, said income forthwith belonged to and was received and retained by the said Emaroy Trust and the beneficiaries thereof in accordance with the terms of its trust indenture; that the income of the said Emaroy Trust was not the income of the said Douglas Smith, was never received by him, directly or indirectly, to his own use and benefit, and could not legally be taxed to him;

12. That during the said period from January 1, 1924 to, to-wit, October 22, 1924, and prior and subsequent thereto, and under the express provision made therefor in the trust indenture of said Emaroy Trust, the said Foreman-State

Trust and Savings Bank (formerly called Foreman Bros. Banking Company) was entitled to receive compensation from said trust as one of the trustees thereof, and upon becoming a trustee thereof, as aforesaid, and in all its acts as a trustee of said trust, said Foreman-State Trust and Savings Bank was a representative of and was acting for the beneficiaries of said Emaroy Trust; that the said Kenneth G. Smith, as one of the trustees of the said Emaroy Trust, was likewise during said period and prior and subse-
44 quent thereto entitled to compensation from said Emaroy Trust, and was a representative of and was acting for the said beneficiaries thereof; that in addition, the said Kenneth G. Smith in his individual capacity was otherwise a beneficiary of the said Emaroy Trust under the terms of its trust indenture; that at no time during the year 1924 did Douglas Smith, the grantor of said Emaroy Trust, have power to revest in himself title to any part of the corpus of said trust without the consent of a beneficiary thereof;

13. That the collection from the said Douglas Smith by the defendant, Mabel G. Reinecke, under protest and duress, of said income taxes for the calendar year 1924 in the said sum of $121,255.95, as aforesaid, to the extent of the said sum of $4,862.09, assessed and collected from the said Douglas Smith upon and by reason of the inclusion in his income tax return of the said net taxable income of the said Emaroy Trust in the said sum of $12,794.97, as above set out, was arbitrary, unauthorized, illegal and without warrant of law.

14. That on, to-wit, May 16, 1929, these plaintiffs as the Executors of the Last Will and Testament of Douglas Smith, Deceased, within the time prescribed therefor by law, filed with the then Collector of Internal Revenue for the First Collection District of Illinois, at Chicago, Illinois, their duly executed claim for refund of income taxes paid by Douglas Smith for the calendar year 1924 in the sum of $68,187.74, in and by which claim for refund plaintiffs claim the refund of said income taxes for the calendar year 1924 which had been illegally and forcibly collected from the said Douglas Smith in his lifetime, in the said sum of $4,862.09, by reason of the inclusion in his net taxable income for said year of the net taxable income of the said Emaroy Trust for the period from January 1, 1924 to, to-wit, October 22, 1924, in the said sum of $12,794.97 as hereinabove set out; that on, to-wit, November 29, 1929, said claim for refund was
45 disallowed in full by the Commissioner of Internal Revenue on a schedule dated the day and year last afore-

said, and plaintiffs were notified of said disallowance by the Commissioner of Internal Revenue by a letter dated, to-wit, November 29, 1929;

15. That by reason of the premises, the defendant, Mabel G. Reinecke, then and there became indebted to and obligated to pay to the said Douglas Smith the said sum of $4,862.09, of which the said Douglas Smith was then and there most wrongfully deprived by the defendant, in the manner and form set forth, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; and being so indebted, in consideration thereof, the defendant herein then and there undertook and faithfully promised the said Douglas Smith to pay to him the said sum of $4,862.09, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; that nevertheless the defendant, though often thereunto requested by the said Douglas Smith during his lifetime and thereafter by the plaintiffs as the duly qualified Executors of his Last Will and Testament, has not paid to the said Douglas Smith during his lifetime or to the plaintiffs or to either of them, since the death of the said Douglas Smith, the said sum of money or the interest thereon or any part thereof, but wholly refuses so to do, to the damage of the plaintiffs as such Executors, as aforesaid, in the sum of Four Thousand Eight Hundred Sixty-two and 9/100 ($4.862.09) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid.

Eighth Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first eleven (11) paragraphs, inclusive, of the Seventh Count hereof, and here now further aver and show:

2. That Section 219 of the Revenue Act of 1924, as
46 applied to the facts herein stated, in so far as said section required or requires or has or may be construed to require that the net taxable income of the Emaroy Trust for said period from January 1, 1924 to, to-wit, October 22, 1924, in the said sum of $12,794.97 be included in the net taxable income of the said Douglas Smith, the grantor of said trusts, for the calendar year 1924, and Sections 210 and 211 of the Revenue Act of 1924 in conjunction with the said Section 219 of said Act, as applied to the facts herein stated, in so far

as said sections required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the Emaroy Trust for the aforesaid period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $12,794.97, or on any part thereof, as being part of his income for the calendar year 1924 and hence taxable to him, personally, were and are ultra vires, unconstitutional, invalid and of no force and effect; that said Sections 210, 211 and 219 of the Revenue Act of 1924 in so far as the same required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the Emaroy Trust for the said period from January 1, 1924 to, to-wit, October 22, 1924 in the said sum of $12,794.97, or on any part thereof, as aforesaid, levied and levy a direct tax upon the said Douglas Smith which was not and is not apportioned among the several States according to their respective numbers and was not and is not laid in proportion to the census or enumeration as was and is required by Clause Third of Section 2 of Article I and by Clause Fourth of Section 9 of said Article I of the Constitution of the United States of America and said sections of the Revenue Act of 1924 in that respect are ultra vires and exceed the limitations placed upon the power and authority of Congress by said Clause Third of Section 2 and Clause Fourth of
47 Section 9 of Article I of said Constitution of the United States; that said Sections 210, 211 and 219 in so far as they required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the Emaroy Trust, as aforesaid, exceeded and exceed the power and authority conferred on Congress by the Sixteenth Amendment to the Constitution of the United States, and in imposing or levying a tax upon the said Douglas Smith for and upon the said net taxable income of the Emaroy Trust, as aforesaid, said sections deprived and deprive the said Douglas Smith of his property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States; that for these and other reasons said Sections 210, 211 and 219 of the Revenue Act of 1924, in so far as they required or require or have been or may be construed to require the payment of income taxes by the said Douglas Smith, as aforesaid, were and are, as

applied to the facts herein stated, ultra vires, unconstitutional, invalid and of no force and effect;

3. Plaintiffs here now incorporate in this count by reference thereto and repeat as if set out at length herein Paragraphs 13, 14 and 15 of said Seventh Count of this Declaration.

Ninth Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first three (3) paragraphs, inclusive, of the First Count hereof and here now further aver and show:

3. That on or about, to-wit, September 25, 1922, in the City of Chicago and State of Illinois, the said Douglas Smith, a resident of said City, and a citizen of the United States, by a trust indenture on that day and at the place aforesaid duly executed by him as grantor, and by himself, the said Kenneth G. Smith, and Foreman Bros. Banking Com-
48 pany, a corporation organized and existing under and by virtue of the laws of the State of Illinois (now Foreman-State Trust and Savings Bank), as trustees, established a trust known as the June Trust for the benefit of his daughter, June Keith Slater, hereinafter sometimes referred to as the beneficiary under said trust; that in and by said trust indenture the said Douglas Smith, Kenneth G. Smith and Foreman Bros. Banking Company were constituted the trustees of the trust thereby established; that at the time of the establishment of said trust and from thence continuously to and including October 23, 1924, Foreman Bros. Banking Company (later during said period known as The Foreman Trust and Savings Bank, now Foreman-State Trust and Savings Bank) was an Illinois corporation duly authorized to act as a trustee of said trust, and the said Douglas Smith and Kenneth G. Smith were each of them citizens of Illinois, of full age and lawfully qualified to act as trustees of said trust;

3. That in and by the said trust indenture establishing the June Trust, as above set out, the grantor, Douglas Smith, conveyed and assigned to the trustees thereof thirty (30) shares of the common capital stock of the Pepsodent Company, and Illinois corporation, and provided that the same should be held and managed by said trustees and that the income therefrom and from all other trust property should

be by them collected and reinvested and accumulated until said stock and all said accumulations and additions thereto amounted to the sum of $300,000.00 and thereafter said trustee should pay over the net income of said trust to the said June Keith Slater during her life; that in and by said trust instrument establishing the June Trust it was further provided that upon the death of the said June Keith Slater, said trust should thereupon terminate and the trust property be distributed as the said beneficiary should by will appoint, and that in default of such appointment, said trust property should be distributed to the surviving issue of
49 the said June Keith Slater, the income only from their share of said principal to be paid to such issue until they respectively reached the age of twenty-one years, and that in the event the said June Keith Slater died leaving no issue, then the said trust estate should be distributed to the Florence and the Kenneth Trusts, two other trusts established by the said Douglas Smith for the benefit respectively of his daughter, Florence Gifford Ellis, and his son, Kenneth G. Smith, at the same time that he established the said June Trust, as above set out, in equal shares;

4. That in said trust indenture establishing the said June Trust it was provided that in the case of the death of a trustee, the remaining trustees had the authority and duty to appoint a successor trustee, providing, however, that one trustee always should be a bank or trust company of the City of Chicago; that said trust indenture establishing the said June Trust contained a provision in the words as follows:

"Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors.";

5. That a true and correct copy of the said trust indenture containing the provisions of the said June Trust is attached hereto and marked Exhibit "B" and said copy of said trust indenture and the provisions therein contained are by this reference incorporated herein and made a part hereof as fully as if herein set out at length;

6. That under the terms of the said trust indentures establishing the said June Trust and the said Kenneth and Florence Trusts, the said Douglas Smith was not a beneficiary of said trusts, or any of them, either as to the principal or the income thereof; that the said Douglas Smith

had no control over said trusts or any of them except as one of the three trustees thereof; that except as one of said three trustees, he had no title to the principal of said trusts, or of any of them, and had no right to receive the same or dispose of it; that except as one of said three trustees
50 he was not entitled to the income of said trusts, or any part thereof, or entitled to receive the same or dispose of it, or any part thereof, and had no right, title or authority to receive, hold or dispose of the same or any part thereof except as directed by said trust indentures, respectively; that throughout the period of the existence of said trusts, the said Douglas Smith in fact never received, directly or indirectly, to his own use or for his own benefit, any of the income thereof, and never exercised any control over the same;

7. That the said June Trust and the said Kenneth and Florence Trusts continued to exist under the terms of their said trust indentures, respectively, in the manner above set out, from the date of the establishment of said trusts continuously until, to-wit, October 22, 1924, when the said trust instrument establishing the said June trust was modified by a separate writing, duly executed by the said Douglas Smith and the other two trustees of said trust, wherein and whereby the said Douglas Smith resigned as trustee of the said June Trust and wherein and whereby the remaining trustees appointed a third person therein named to succeed him as such trustee; that in and by said modification, the provision contained in said trust indenture establishing the said June Trust, as above set out, that the said trust might be revoked or modified by a writing signed by the said Douglas Smith and one of the other two trustees thereof, as above set out, was so altered that said trust was not thereafter revocable or subject to modification by the said Douglas Smith, either acting alone or in conjunction with any other person;

8. That during the period from January 1, 1924 to, to-wit, the 22d day of October of said year, being the date of the execution of the aforesaid modification of said trust indenture establishing the June Trust, as hereinabove set out, the net taxable income of the said June Trust amounted to
51 the sum of $7,725.32; that having theretofore on or about, to-wit, March 14, 1925, filed a tentative income tax return for the calendar year 1924, in which was set out an estimated income tax for said year in the sum of $64,000.00, which did not include any income tax upon or by reason of the said net taxable income of the said June Trust for said period,

or upon or by reason of any part thereof, the said Douglas Smith on or about, to-wit, May 14, 1925, filed with the defendant, Mabel G. Reinecke, the then Collector of Internal Revenue, at Chicago, Illinois, his individual income tax return for the said calendar year 1924, and included in his said individual income tax return, at Item 9 (b) therein, the aforesaid net taxable income of the said June Trust in the aforesaid sum of $7,725.32; that the said net taxable income of the said June Trust for said period in said amount was included by the said Douglas Smith in his said income tax return involuntarily and under protest and duress; that said protest was duly filed in writing by the said Douglas Smith with his said return;

9. That the income taxes due to the United States upon the net taxable income for the calendar year 1924, as set out in the said individual return of income so filed by the said Douglas Smith, as aforesaid, including the aforesaid net taxable income of the said June Trust in the said sum of $7,725.32 was the sum of $121,255.95; that said income taxes in said amount were assessed against the said Douglas Smith and were by him, involuntarily and under protest and duress, and to avoid threatened penalties and distraint of his property, paid to the defendant, the said Mabel G. Reinecke, the then Collector of Internal Revenue of the United States for the First Collection District of Illinois, at Chicago, Illinois, in installments as follows, that is to say, on March 14, 1925, $16,000.00; and May 13, 1925, $14,313.99; on June 12, 1925, $30,313.99; on September 14, 1925, $30,313.98; and on December 14, 1925, $30,313.99; that of the said income taxes for the year 1924 in the said sum of $121,255.95 so assessed
52 against the said Douglas Smith and by him under protest and duress paid to the defendant, Mabel G. Reinecke, as aforesaid, the sum of $2,935.63 was assessed against him and by him involuntarily paid to the defendant, as above set out, upon and by reason of the aforesaid net taxable income of the said June Trust for the period aforesaid in the said sum of $7,725.32, which was by him included in his said individual return of income for the year 1924, under protest and duress, as hereinabove set out;

10. That the Revenue Act of 1924 was enacted and became a law on June 2, 1924; that Section 219, paragraph (g), of that Act provided as follows:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any per-

son not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.";

11. That the said Douglas Smith never directly or indirectly received any of the aforesaid net income of the said June Trust in the said sum of $7,725.32 upon which he was required to and did pay income taxes to the defendant in the said sum of $2,935.63, as aforesaid, other than as one of the three trustees of said trust; that throughout the period from January 1, 1924 to, to-wit, October 22, 1924, the said Douglas Smith alone had no power to revoke said June Trust or to revest in himself title to any part of the corpus of said trust, but the said June Trust could be revoked by him and he could revest in himself title to the corpus of said trust only with the consent of one of the other two trustees thereof, namely, the said Kenneth G. Smith and Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company); that the said June Trust remained in existence unrevoked throughout the period from January 1, 1924 to, to-wit, October 22, 1924, as aforesaid, and immediately upon the receipt during said period, of the said income of the said June Trust, or any part thereof, said
53 income forthwith belonged to and was received and retained by said June Trust and the beneficiaries thereof in accordance with the terms of its trust indenture; that the income of said June Trust was not the income of the said Douglas Smith, was never received by him, directly or indirectly, to his own use and benefit and could not legally be taxed to him;

12. That during the said period from January 1, 1924, to, to-wit, October 22, 1924, and prior and subsequent thereto, and under the express provision made therefor in the trust indenture of said June Trust, the said Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company) was entitled to receive compensation from said trust as one of the trustees thereof, and upon becoming a trustee thereof, as aforesaid, and in all its acts as a trustee of said trust, said Foreman-State Trust and Savings Bank was a representative of and was acting for the beneficiaries of said June Trust; that the said Kenneth G. Smith, as one of the trustees of the said June Trust, was likewise during said period and prior and subsequent thereto entitled to compensation from said June Trust, and was a representative of

and was acting for the said beneficiaries thereof; that in addition, the said Kenneth G. Smith in his individual capacity was otherwise a beneficiary of the said June Trust under the terms of its trust indenture; that plaintiffs therefore aver that at no time during the year 1924 did Douglas Smith, the grantor of said June Trust, have power to revest in himself title to any part of the corpus of said trust without the consent of a beneficiary thereof;

13. That the collection from the said Douglas Smith by the defendant, Mabel G. Reinecke, under protest and duress, of said income taxes, for the calendar year 1924 in the said sum of $121,255.95, as aforesaid, to the extent of the said sum of $2,935.63, assessed and collected from the said Douglas Smith upon and by reason of the inclusion in his in-
54 come tax return of the said net taxable income of the said June Trust in the said sum of $7,725.32, as above set out, was arbitrary, unauthorized, illegal and without warrant of law;

14. That on, to-wit, May 16, 1929, those plaintiffs as the Executors of the Last Will and Testament of Douglas Smith, Deceased, within the time prescribed therefor by law, filed with the then Collector of Internal Revenue for the First Collection District of Illinois, at Chicago, Illinois, their duly executed claim for refund of income taxes paid by Douglas Smith for the calendar year 1924 in the sum of $68,187.74, in and by which claim for refund plaintiffs claim the refund of said income taxes for the calendar year 1924 which had been illegally and forcibly collected from the said Douglas Smith in his lifetime, in the said sum of $2,935.63, by reason of the inclusion in his net taxable income for said year of the net taxable income of the said June Trust for the period from January 1, 1924 to, to-wit, October 22, 1924, in the said sum of $7,725.32, as hereinabove set out; that on, to-wit, November 29, 1929, said claim for refund was disallowed in full by the Commissioner of Internal Revenue on a schedule dated the day and year last aforesaid, and plaintiffs were notified of said disallowance by the Commissioner of Internal Revenue by a letter dated, to-wit, November 29, 1929;

15. That by reason of the premises, the defendant, Mabel G. Reinecke, then and there became indebted to and obligated to pay to the said Douglas Smith the said sum of $2,935.63, of which the said Douglas Smith was then and

there most wrongfully deprived by the defendant, in the manner and form set forth, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid, and being so indebted, in consideration thereof, the defendant herein then and there undertook and faithfully promised the said Douglas Smith to pay to him the said sum of $2,935.63, together with interest
55 thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; that nevertheless the defendant, though often thereunto requested by the said Douglas Smith during his lifetime and thereafter by the plaintiff's as the duly qualified Executors of his Last Will and Testament has not paid to the said Douglas Smith during his lifetime or to the plaintiffs or to either of them, since the death of the said Douglas Smith, the said sum of money or the interest thereon or any part thereof, but wholly refuses so to do, to the damage of the plaintiffs as such Executors, as aforesaid, in the sum of Two Thousand Nine Hundred Thirty-five and 63/100 ($2,935.63) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid.

Tenth Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first eleven paragraphs, inclusive, of the Ninth Count hereof, and here now further aver and show:

2. That Section 219 of the Revenue Act of 1924, as applied to the facts herein stated, in so far as said section required or requires or has or may be construed to require that the net taxable income of the June Trust for said period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $7,725.32 be included in the net taxable income of the said Douglas Smith, the grantor of said trusts, for the calendar year 1924, and Sections 210 and 211 of the Revenue Act of 1924 in conjunction with the said Section 219 of said Act, as applied to the facts herein stated, in so far as said Sections required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the June Trust for the aforesaid period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $7,725.32, or

on any part thereof, as being part of his income for the
56 calendar year 1924 and hence taxable to him, personally, were and are ultra vires, unconstitutional, invalid and of no force and effect; that said Sections 210, 211 and 219 of the Revenue Act of 1924 in so far as the same required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the June Trust for the said period from January 1, 1924, to, to-wit, October 22, 1924 in the said sum of $7,725.32, or on any part thereof, as aforesaid, levied and levy a direct tax upon the said Douglas Smith which was not and is not apportioned among the several States according to their respective numbers and was not and is not laid in proportion to the census or enumeration as was and is required by Clause Third of Section 2 of Article I and by Clause Fourth of Section 9 of said Article I of the Constitution of the United States of America and said sections of the Revenue Act of 1924 in that respect are ultra vires and exceed the limitations placed upon the power and authority of Congress by said Clause Third of Section 2 and Clause Fourth of Section 9 of Article I of said Constitution of the United States; that said Sections 210, 211 and 219 in so far as they required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the June Trust, as aforesaid, exceeded and exceed the power and authority conferred on Congress by the Sixteenth Amendment to the Constitution of the United States, and in imposing or levying a tax upon the said Douglas Smith for and upon the said net taxable income of the June Trust, as aforesaid, said sections deprived and deprive the said Douglas Smith of his property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States; that for these and other reasons said Sections 210, 211, and 219 of the
Revenue Act of 1924, in so far as they required or re-
57 quire or have been or may be construed to require the payment of income taxes by the said Douglas Smith, as aforesaid, were and are, as applied to the facts herein stated, ultra vires, unconstitutional, invalid and of no force and effect;

3. Plaintiffs here now incorporate in this count by reference thereto and repeat as if set out at length herein Paragraphs 13, 14 and 15 of said Ninth Count of this Declaration.

Eleventh Count.

1. Plaintiffs here now incorporate in this Count by reference thereto and repeat as if herein set out at length the first three (3) paragraphs, inclusive, of the First Count hereof and here now further aver and show;

2. That on or about, to-wit, September 25, 1922, in the City of Chicago and State of Illinois, the said Douglas Smith, a resident of said City, and a citizen of the United States, by a trust indenture on that day and at the place aforesaid duly executed by him as grantor, and by himself, the said Kenneth G. Smith, and Foreman Bros. Banking Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois (now Foreman-State Trust and Savings Bank), as trustees, established a trust known as the Florence Trust for the benefit of his daughter, Florence Gifford Ellis, hereinafter sometimes referred to as the beneficiary under said trust; that in and by said trust indenture the said Douglas Smith, Kenneth G. Smith and Foreman Bros. Banking Company were constituted the trustees of the trust thereby established; that at the time of the establishment of said trust and from thence continuously to and including October 22, 1924, Foreman Bros. Banking Company (later during said period known as The Foreman Trust and Savings Bank, now Foreman-State Trust and Savings Bank) was an Illinois corporation duly authorized to act as a trustee of said trust, and the said Douglas Smith and Kenneth G. Smith were each of them citizens of Illinois,
58 of full age and lawfully qualified to act as trustees of said trust;

3. That in and by the said trust indenture establishing the Florence Trust, as above set out, the grantor, Douglas Smith, conveyed and assigned to the trustees thereof thirty (30) shares of the common capital stock of the Pepsodent Company, an Illinois corporation, and provided that the same should be held and managed by said trustees and that the income therefrom and from all other trust property should be by them collected and reinvested and accumulated until said stock and all said accumulations and additions thereto amounted to the sum of $300,000.00 and thereafter said trustees should pay over the net income of said trust to the said Florence Gifford Ellis during her life; that in and by said trust instrument it was further provided that upon the death of the said Florence Gifford Ellis, said trust should there-

upon terminate and the trust property be distributed as the said beneficiary should by will appoint, and that in default of such appointment, said trust property should be distributed to the surviving issue of the said Florence Gifford Ellis, the income only from their share of said principal to be paid to such issue until they respectively reached the age of twenty-one years, and that in the event the said Florence Gifford Ellis died leaving no issue, then the said trust estate was to be distributed to the June and Kenneth Trusts, two other trusts established by the said Douglas Smith for the benefit respectively of his daughter, June Keither Slater, and his son, Kenneth G. Smith, at the same time that he established the said Florence Trust, as above set out, in equal shares;

4. That in said trust indenture establishing the said Florence Trust it was provided that in the case of the death of a trustee, the remaining trustees had the authority and duty to appoint a successor trustee, providing, however, that one trustee always should be a bank or trust company of the City of Chicago; that said trust indenture establishing the said Florence Trust contained a provision in the words as follows:

59 "Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by any instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors;"

5. That a true and correct copy of the said trust indenture containing the provisions of the said Florence Trust is attached hereto and marked Exhibit "C" and said copy of said trust indenture and the provisions therein contained are by this reference incorporated herein and made a part hereof as fully as if herein set out at length;

6. That under the terms of the said trust indentures establishing the said Florence Trust and the said Kenneth and June Trusts, the said Douglas Smith was not a beneficiary of said trusts, or any of them, either as to the principal or the income thereof; that the said Douglas Smith had no control over said trusts or any of them except as one of the three trustees thereof; that except as one of said three trustees, he had no title to the principal of said trusts, or of any of them, and had no right to receive the same or dispose of it; that except as one of said three trustees he was not entitled to the income of said trusts, or any part thereof, or entitled to receive the same or dispose of it, or any part thereof, or entitled to receive the same or dispose of it, or any part thereof,

and had no right, title or authority to receive, hold or dispose of the same or any part thereof except as directed by said trust indentures, respectively; that throughout the period of the existence of said trusts, the said Douglas Smith in fact never received, directly or indirectly, to his own use and benefit, any of the income thereof, and never exercised any control over the same;

7. That the said Florence Trust and the said Kenneth and June Trusts continued to exist under the terms of their said trust indentures, respectively, in the manner above set out, from the date of the establishment of said trusts continuously until, to-wit, October 22, 1924, when the said trust instrument establishing the said Florence Trust was
60 modified by a separate writing, duly executed by the said Douglas Smith and the other two trustees of said trust, wherein and whereby the said Douglas Smith resigned as trustee of the said Florence Trust and wherein and whereby the remaining trustees appointed a third person therein named to succeed him as such trustee; that in and by said modification, the provision contained in said trust indenture establishing the said Florence Trust that the said trust might be revoked or modified by a writing signed by the said Douglas Smith and one of the other two trustees thereof, as above set out, was so altered that said trust was not thereafter revocable or subject to modification by the said Douglas Smith, either acting alone or in conjunction with any other person;

8. That during the period from January 1, 1924, to, to-wit, the 22nd day of October of said year, being the date of the execution of the aforesaid modification of said trust indenture establishing the Florence Trust, as hereinabove set out, the net taxable income of the said Florence Trust amounted to the sum of $7,725.32; that having theretofore on or about, to-wit, March 14, 1925, filed a tentative income tax return for the calendar year 1924, in which was set out an estimated income tax for said year in the sum of $64,000.00, which did not include any income tax upon or by reason of the said net taxable income of the said Florence Trust for said period, or upon or by reason of any part thereof, the said Douglas Smith on or about, to-wit, Mary 14, 1925, filed with the defendant, Mabel G. Reinecke, the then Collector of Internal Revenue, at Chicago, Illinois, his individual income tax return for the said calendar year 1924, and included in his said individual income tax return, at Item 9 (b) therein, the aforesaid net taxable income of the said

Florence Trust in the aforesaid sum of $7,725.32; that the said net taxable income of the said Florence Trust for said period in said amount was included by the said Douglas Smith in his said income tax return involuntarily and under protest and duress; that the said protest was duly filed in writing by the said Douglas Smith with his said re-
61 turn;

9. That the income taxes due to the United States upon the net taxable income for the calendar year 1924, as set out in the said individual return of income so filed by the said Douglas Smith, as aforesaid, including the aforesaid net taxable income of the said Florence Trust in the said sum of $7,725.32, was the sum of $121,255.95; that said income taxes in said amount were assessed against the said Douglas Smith and were by him, under protest and duress, and to avoid threatened penalties and distraint of his property, paid to the defendant, the said Mabel G. Reinecke, the then Collector of Internal Revenue of the United States for the First Collection District of Illinois, at Chicago, Illinois, in installments as follows, that is to say, on March 14, 1925, $16,000; on May 13, 1925, $14,313.99; on June 12, 1925, $30,-313.99; on September 14, 1925, $30,313.98; and on December 14, 1925, $30,313.99; that of the said income taxes for the year 1924 in the said sum of $121,255.95 so assessed against the said Douglas Smith and by him under protest and duress paid to the defendant, Mabel G. Reinecke, as aforesaid, the sum of $2,935.63 was assessed against him and by him involuntarily paid to the defendant, upon and by reason of the aforesaid net taxable income of the said Florence Trust for the period aforesaid in the said sum of $7,725.32, which was by him included in his said individual return of income for the year 1924, under protest and duress, as hereinabove set out;

10. That the Revenue Act of 1924 was enacted and became a law on June 2, 1924; that Section 219, paragraph (g), of that Act provided as follows:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor;"

11. That the said Douglas Smith never directly or in-

directly received any of the aforesaid net income of the
62 said Florence Trust in the said sum of $7,725.32 upon
which he was required to and did pay income taxes to the defendant in the said sum of $2,935.63, as aforesaid, other than as one of the three trustees of said trust; that throughout the period from January 1, 1924, to, to-wit, October 22, 1924, the said Douglas Smith alone had no power to revoke said Florence Trust or to revest in himself title to any part of the corpus of said trust, but the said Florence Trust could be revoked by him and he could revest in himself title to the corpus of said trust only with the consent of one of the other two trustees thereof, namely, the said Kenneth G. Smith and Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company); that the said Florence Trust remained in existence unrevoked throughout the period from January 1, 1924, to, to-wit, October 22, 1924, as aforesaid, and immediately upon the receipt during said period, of the said income of the said Florence Trust, or any part thereof, said income forthwith belonged to and was received and retained by said Florence Trust and the beneficiaries thereof in accordance with the terms of its trust indenture; that the income of said Florence Trust was not the income of the said Douglas Smith, was never received by him, directly or indirectly, to his own use and benefit and could not legally be taxed to him;

12. That during the said period from January 1, 1924, to, to-wit, October 22, 1924, and prior and subsequent thereto, and under the express provision made therefor in the trust indenture of said Florence Trust, the said Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company) was entitled to receive compensation from said trust as one of the trustees thereof, and upon becoming a trustee thereof, as aforesaid, and in all its acts as a trustee of said trust, said The Foreman Trust and Savings Bank was a representative of and was acting for the
beneficiaries of said Florence Trust; that said Kenneth
63 G. Smith, as one of the trustees of the said Florence
Trust, was likewise during said period and prior and subsequent thereto entitled to compensation from said Florence Trust, and was a representative of and was acting for the said beneficiaries thereof; that in addition, the said Kenneth G. Smith in his individual capacity was otherwise a beneficiary of the said Florence Trust under the terms of its trust indenture; that at no time during the year 1924 did

Douglas Smith, the grantor of said Florence Trust, have power to revest in himself title to any part of the corpus of said trust without the consent of a beneficiary thereof;

13. That for the reasons above stated, the collection from the said Douglas Smith by the defendant, Mabel G. Reinecke, under protest and duress, of said income taxes, for the calendar year 1924 in the said sum of $121,255.95, as aforesaid, to the extent of the said sum of $2,935.63, assessed and collected from the said Douglas Smith by reason of the inclusion in his income tax return of the said net taxable income of the said Florence Trust in the said sum of $7,725.32, as above set out, was arbitrary, unauthorized, illegal and without warrant of law;

14. That on, to-wit, May 16, 1929, these plaintiffs as the Executors of the Last Will and Testament of Douglas Smith, deceased, within the time prescribed therefor by law, filed with the then Collector of Internal Revenue for the First Collection District of Illinois, at Chicago, Illinois, their duly executed claim for refund of income taxes paid by Douglas Smith for the calendar year 1924 in the sum of $68,187.74, in and by which claim for refund plaintiffs claim the refund of said income taxes for the calendar year 1924 which had been illegally and forcibly collected from the said Douglas Smith in his lifetime, in the said sum of $2,935.63, by reason of the inclusion in his net taxable income for said year of the net taxable income of the said Florence Trust for the period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $7,725.32, as hereinabove set out; that
64 on, to-wit, November 29, 1929, said claim for refund was disallowed in full by the Commissioner of Internal Revenue on a schedule dated the day and year last aforesaid, and plaintiffs were notified of said disallowance by the Commissioner of Internal Revenue by a letter dated, to-wit, November 29, 1929;

15. That by reason of the premises, the defendant, Mabel G. Reinecke, then and there became indebted to and obligated to pay to the said Douglas Smith the said sum of $2,935.63, of which the said Douglas Smith was then and there most wrongfully deprived by the defendant, in the manner and form set forth, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; and being so indebted, in consideration thereof, the defendant herein then and there undertook and faithfully promised the said Douglas Smith to pay to him the said

sum of $2,935.63, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; that nevertheless the defendant, though often thereunto requested by the said Douglas Smith during his lifetime and thereafter by the plaintiffs as the duly qualified Executors of his Last Will and Testament has not paid to the said Douglas Smith during his lifetime or to the plaintiffs or to either of them since the death of the said Douglas Smith, the said sum of money or the interest thereon or any part thereof, but wholly refuses so to do, to the damage of the plaintiffs as such Executors, as aforesaid, in the sum of Two Thousand Nine Hundred Thirty-five and 63/100 ($2,935.63) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid.

Twelfth Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first eleven (11) paragraphs, inclusive, of the Eleventh Count hereof and here now further aver and show:

2. That Section 219 of the Revenue Act of 1924, as
65 applied to the facts herein stated, in so far as said section required or requires or has or may be construed to require that the net taxable income of the Florence Trust for said period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $7,725.32 be included in the net taxable income of the said Douglas Smith, the grantor of said trusts, for the calendar year 1924, and Sections 210 and 211 of the Revenue Act of 1924 in conjunction with the said Section 219 of said Act, as applied to the facts herein stated, in so far as said sections required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the Florence Trust for the aforesaid period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $7,725.32, or on any part thereof, as being part of his income for the calendar year 1924 and hence taxable to him personally, were and are ultra vires, unconstitutional, invalid and of no force and effect; that said Sections 210, 211 and 219 of the Revenue Act of 1924 in so far as the same required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the

United States upon the said net taxable income of the Florence Trust for the said period from January 1, 1924, to, to-wit, October 22, 1924 in the said sum of $7,725.32, or on any part thereof, as aforesaid, levied and levy a direct tax upon the said Douglas Smith which was not and is not apportioned among the several States according to their respective numbers and was not and is not laid in proportion to the census or enumeration as was and is required by Clause Third of Section 2 of Article I and by Clause Fourth of Section 9 of said Article I of the Constitution of the United States of America and said sections of the Revenue Act of 1924 in that respect are ultra vires and exceed the limitations placed upon the power and authority of Congress by said Clause
66 Third of Section 2 and Clause Fourth of Section 9 of Article I of said Constitution of the United States; that said Sections 210, 211 and 219 in so far as they required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the Florence Trust, as aforesaid, exceeded and exceed the power and authority conferred on Congress by the Sixteenth Amendment to the Constitution of the United States, and in imposing or levying a tax upon the said Douglas Smith for and upon the said net taxable income of the Florence Trust, as aforesaid, said sections deprived and deprive the said Douglas Smith of his property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States; that for these and other reasons said Secions 210, 211 and 219 of the Revenue Act of 1924, in so far as they required or require or have been or may be construed to require the payment of income taxes by the said Douglas Smith, as aforesaid, were and are, as applied to the facts herein stated, ultra vires, unconstitutional, invalid and of no force and effect;

3. Plaintiffs here now incorporate in this count by reference thereto and repeat as if set out at length herein Paragraphs 13, 14 and 15 of said Eleventh Count of this Declaration;

All to the damage of plaintiffs as they say of One Hundred Twenty-five Thousand ($125,000) Dollars.

Wherefore, plaintiffs bring their suit.

(Signed) Hopkins, Starr & Hopkins
(Signed) Burry, Johnstone, Peters & Dixon
Attorneys for Plaintiffs.

67 EXHIBIT "A"

Emaroy Trust

This Agreement, made this 26th day of September 1922 between Douglas Smith of Chicago (hereinafter sometimes called the Grantor), and Foreman Bros. Banking Co. of Chicago, Douglas Smith and Kenneth G. Smith of Chicago, as Trustees,

Witnesseth That:

It is the desire and intent of the Grantor during his own lifetime to make provision for his wife, Emaroy J. Smith, in order that she may me assured of support and maintenance in a manner in keeping with the present circumstances of the Grantor, and to that end to place certain property in trust for her benefit and to add thereto until a definite amount has been reached.

Now Therefore the said Grantor for and in consideration of love and affection and other good and valuable considerations and in consideration of the execution and performance of the Trusts hereinafter declared, has assigned, transferred and delivered, and by these presents does assign, transfer and deliver unto Foreman Bros. Banking Co., Douglas Smith and Kenneth G Smith as Trustees, and to their successors and assigns in said Trust, the following securities, to-wit:

Fifty (50) shares of the common capital stock of the Pepsodent Company, a corporation of Illinois.

Said Fifty shares of stock together with all income therefrom and all cash, securities or other property that may be hereafter added thereto are to be held by said Trustees in a trust to be known as the Emaroy Trust for and upon the following uses, purposes and conditions:

1. Said Trustee are directed to collect the income and invest and reinvest the same from time to time until the aggregate value thereof together with all accumulations and
68 additions thereto amounts, in the opinion of a majority of the Trustees, to the sum of Five Hundred Thousand Dollars ($500,000).

2. When the value of the property so accumulated in the Emaroy Trust has reached said amount of Five Hundred Thousand Dollars ($500,000) the net income therefrom, from that time forward, shall be paid in equal monthly installments to or for the account of said Emaroy J. Smith.

3. Upon the death of said Emaroy J. Smith, accumulation shall cease, and the principal of this trust shall go as said Emaroy J. Smith may by last will in writing appoint, and failing appointment, said principal shall be divided equally between three trusts created by instruments of even date herewith for the benefit of Grantor's children, said trusts being known respectively as the Florence Trust, the June Trust and the Kenneth Trust.

4. All stock certificates, bonds and other securities and all evidences of title of trust property shall be deposited and remain with said Trustee, the Foreman Bros. Banking Co.

5. Said Trustees shall hold, manage and control the said Trust Estate and shall have full power to sell, assign, pledge, mortgage, transfer and deliver any or all of the properties and securities held by them as Trustees at such prices and upon such terms as in their discretion they may deem for the best interests of the Estate. They are given full power and authority to invest and reinvest in such securities and in such manner as in their judgment is wise. Said Trustees are given as wide a latitude in the making of investments and as full power over the assets committed to their charge as if they were in fact the sole legal and equitable owner thereof. Save with the written approval of Douglas Smith, however, no sale shall be made of said Pepsodent stock by said Trustees for a period of fifteen years from the date of this instrument. In the event of Douglas Smith's death no such
69 sale shall be made for five years thereafter without the written approval of Kenneth Smith.

6. Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith, and either one of the other two trustees or their successors.

7. Said Trustee shall collect the income, and after paying all necessary expenses, including a reasonable compensation to the Trustees and reimbursement of all expenses incurred in the administration of the Trust, including counsel fees when necessary, shall make disbursement in the manner herinabove directed.

8. Payments shall be made only upon the personal receipt of the beneficiaries or their guardians. Any adult beneficiary of sound mind, however, may in writing appoint an agent to receive income which has become due. Such appointment shall not be valid for more than one year. No beneficiary shall have any right or authority to assign or anticipate any

income or allowance or any disbursement of any part of the principal which he might be entitled to receive, under any of the provisions of said Trust, and no interest of the beneficiaries either in principal or income shall be alienable in any manner or to any extent for the obligations or liabilities, voluntary or involuntary, of such beneficiaries or for any claims against them or any of them of whatsoever character.

9. If and when the Trustee are required to make any division or a distribution said Trustees are authorized to make such division or distribution of any securities, property or cash as they may see fit, and for that purpose the value which said Trustees may place on the respective securities and properties shall be final and binding.

10. It shall not be the duty of the purchaser of any trust property to see to the application of the purchase money paid therefor nor shall any one who may deal with said Trustees be privileged or required to inquire into the necessity or expediency of any act of said Trustees or of the provisions of this instrument.

11. All taxes of whatsoever nature which are legally imposed upon or assessed against this trust or the income thereof or against any beneficiary on account of said trust or the receipt of income therefrom, shall in each case be paid by the Trustees out of the income of this trust.

12. The Trustees shall have full power and authority to vote in any manner by them or a majority of them deemed proper any stock held as Trustees or in their discretion may vote such stock by proxy and are hereby duly authorized to execute and deliver any proxies for stock of any corporation held in trust hereunder. In voting such stock the Trustees shall have full discretion and power as though they were the holders of the same in their own right.

13. The Trustees shall have full power and authority to avail themselves in their discretion of any bond or stock subscription privileges which may at any time accrue to them as the holders or owners of any securities of any corporation.

14. The Trustees in their discretion are hereby authorized to unite with other owners of property or securities similar to any held by them in trust hereunder in carrying out any plan for reorganization of any corporation or company whose securities form part of any of the trust estate; to exchange the securities of any corporation for others issued by the same or by any other corporation upon such terms as the Trustees shall deem proper; to assent to the consoli-

dation or merger of any corporation whose securities are held by them with any other corporation; to the lease by such corporation of its property or any portion thereof to any other corporation, or to the lease by any other corporation of its property to such corporation; and upon any such consolidation, merger, lease or similar arrangement to exchange
71 the securities held hereunder for other securities, pursuant to such arrangement; and to pay all such assessments, expenses, and sums of money as they may deem expedient for the protection of the interests of the Trust estate in stocks, bonds, or other securities, and generally to exercise with respect to all securities held by them all the same rights and powers as may be lawfully exercised by individual persons owning similar property in their own right.

15. The Trustees shall have the power to determine according to their own judgment what is and what is not net income from this trust, and what is and what is not principal, and their decision in that respect shall be final and binding.

16. In case of the refusal or inability of any trustee to perform any duty under the Trusts hereby provided, the Trusteeship shall thereby be vacated as to such Trustee and in such case or in case of the death or resignation of any trustee the remaining trustees shall have authority, and it shall be their duty, to appoint another trustee to fill the vacancy so caused that that at all times there may be three competent trustees. One of said Trustees, however, must always be a bank or trust company of the city of Chicago. If two vacancies occur at the same time, the surviving trustee may appoint two successor trustees. The appointment of new trustees aind their acceptance shall be in writing.

In Witness Whereof the parties hereto have executed this agreement the day and year first above written.

Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
KENNET G. SMITH (Seal)
DOUGLAS SMITH (Seal)
As Trustees.

Attest:
JAMES A. HENNING
(Seal) *Secretary.*

72 MODIFICATION OF EMAROY TRUST.

November 4th 1922

This Instrument, executed this 4th day of November 1922 by Douglas Smith of Chicago (hereinafter sometimes called the Grantor) and Foreman Bros. Banking Co. of Chicago, as Trustee,

Witnesseth That

Whereas, by instrument dated September 25, 1922, the Grantor established a trust for the benefit of his wife, Emaroy J. Smith, known as the Emaroy Trust, under which Foreman Bros. Banking Co. of Chicago is one of the Trustees. Said trust agreement contains the following provision which appears as paragraph six thereof:

"Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors."

Pursuant to the above power and in accordance therewith said Emaroy Trust agreement is hereby modified in the following particulars:

1. By striking out paragraph 11 thereof.
2. By adding as paragraph 2-a thereof the following:

2-a. It is the intent of Grantor and is so understood by his said wife that said Emaroy Trust Fund of Five Hundred Thousand Dollars ($500,000) shall represent his said wife's share in his estate and shall be in lieu of her dower and statutory interest therein. Should said Emaroy J. Smith survive Grantor and should she elect to renounce his last will and testament, then upon such renunciation this Emaroy Trust shall at once terminate and the entire Trust Fund shall thereupon be delivered over to Grantor's executors and become part of Grantor's estate."

Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
As Trustee under the Emaroy Trust.

73 EXHIBIT "B"

June Trust

This Agreement, made this 25th day of September 1922 between Douglas Smith of Chicago (hereinafter sometimes called the Grantor), and Foreman Bros. Banking Co. of Chicago, Douglas Smith and Kenneth G. Smith of Chicago, as Trustees,

Witnesseth That:

It is the desire and intent of the Grantor to settle, assign, transfer and deliver certain securities of which he is now the owner and which are hereafter described, for the uses and purposes and upon the conditions hereafter set forth:

Now Therefore the said Grantor for and in consideration of love and affection and other good and valuable considerations and in consideration of the execution and performance of the Trusts hereinafter declared, has assigned, transferred and delivered, and by these presents does assign, transfer and deliver unto Foreman Bros. Banking Co., Douglas Smith and Kenneth G. Smith as Trustees, and to their successors and assigns in said Trust, the following securities, to-wit:

Thirty (30) shares of the common capital stock of the Pepsodent Company, a corporation of Illinois.

Said thirty shares of stock together with all income therefrom and all cash, securities or other property that may hereafter be added thereto are to be held by said Trustees in a trust known as the June Trust for and upon the following uses, purposes and conditions:

1. Said Trustees are directed to collect the income and invest and reinvest the same from time to time until the value thereof together with all accumulations and additions thereto amounts, in the opinion of a majority of the Trustees, to
74 the sum of Three Hundred Thousand Dollars ($300-000).

2. When the property so accumulated in the June Trust has reached said amount of Three Hundred Thousand Dollars ($300,000) the net income therefrom, from that time forward, shall be paid in equal monthly installments to or for the account of June Keith Slater, the daught of the Grantor, during her life.

3. Upon the death of said June Keith Slater, accumula-

tion shall cease and the principal of this Trust shall go as said beneficiary may by last will in writing appoint, and failing appointment, shall be disposed of by said Trustee as follows:

a. If said June Keith Slater dies leaving issue, the principal of said June Trust shall become the property of such issue in equal shares, the income therefrom to be paid in equal parts to said issue until they respectively reach the age of Twenty-one (21) years and as and when they respectively reach said age that part of the principal from which said issue have been so receiving income shall be delivered over to them respectively as their absolute property.

b. If she dies leaving no issue, the principal of the Trust shall go to increase equally two trusts created by instruments of even date herewith for the benefit of her brother and sister,—being known as the Florence Trust and the other as the Kenneth Trust.

4. All stock certificates, bonds and other securities and all evidence of title of trust property shall be deposited and remain with said Trustee, the Foreman Bros. Banking Co.

5. Said Trustees shall hold, manage and control the said Trust Estate and shall have full power to sell, assign, pledge, mortgage, transfer and deliver any or all of the properties and securities held by them as Trustees at such prices and upon such terms as in their discretion they may deem for the best interests of the Estate. They are given full power and authority to invest and reinvest in such securities and in such manner as in their judgment is wise. Said Trustee sare given as wide a latitude in the making of investments and as full power over the assets committed to their charge as if they were in fact the sole legal and equitable owners thereof. Save with the written approval of Douglas Smith, however, no sale shall be made of said Pepsodent stock by said Trustees for a period of fifteen years from the date of this instrument. In the event of Douglas Smith's death no such sale shall be made for five years thereafter without the written approval of Kenneth G. Smith.

6. Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith, and either one of the other two trustees or their successors.

7. Said Trustees shall collect the income, and after paying all necessary expenses, including a reasonable compensation to the Trustees and reimbursement of all expenses

incurred in the administration of the Trust, including counsel fees when necessary, shall make disbursement in the manner hereinabove directed.

8. Payments shall be made only upon the personal receipt of the beneficiaries or their guardians. Any adult beneficiary of sound mind, however, may in writing appoint an agent to receive income which shas become due. Such appointment shall not be vaild for more than one year. No
76 beneficiary shall have any right or authority to assign or anticipate any income or allowance or any disbursement of any part of the principal which he might be entitled to receive, under any of the provisions of said Trust, and no interest of the beneficiaries either in principal or income shall be alienable in any manner or to any extent for the obligations or liabilities, voluntary or involuntary, of such beneficiaries or for any claims against them or any of them of whatsoever character.

9. If and when the Trustees are required to make any division or distribution said Trustees are authorized to make such division or distribution of any securities, property or cash as they may see fit, and for that purpose the value which said Trustees may place on the respective securities and properties shall be final and binding.

10 It shall not be the duty of the purchaser of any trust property to see to the application of the purchase money paid therefor nor shall any one who may deal with said Trustee be privileged or required to inquire into the necessity or expediency of any act of said Trustees or of the provisions of this instrument.

11. All taxes of whatsoever nature which are legally imposed upon or assessed against this trust or the income thereof or against any beneficiary on account of said trust or the receipt of income therefrom, shall in each case be paid by the Trustees out of the income of this trust.

12. The Trustees shall have full power and authority to vote in any manner by them or a majority of them deemed proper any stock held as Trustees or in their discretion may vote such stock by proxy and are hereby duly authorized to execute and deliver any proxies for stock of any corpo-
77 ration held in trust hereunder. In voting such stock the Trustees shall have full discretion and power as though they were the holders of the same in their own right.

13. The Trustees shall have full power and authority to avail themselves in their discretion of any bond or stock subscription privileges which may at any time accrue to them as the holders or owners of any securities of any corporation.

14. The Trustees in their discetion are hereby authorized to unite with other owners of property or securities similar to any held by them in trust hereunder in carrying out the plan for reorganization of any corporation or company whose securities form part of any of the trust estate; to exchange the securities of any corporation for others issued by the same or by any other corporation upon such terms as the Trustees shall deem proper; to assent to the consolidation or merger of any corporation whose securities are held by them with any other corporation; to the lease by such corporation of its property or any portion thereof to any other corporation, or to the lease by any other corporation of its property to such corporation; and upon any such consolidation, merger, lease or similar arrangement to exchange the securities held hereunder for other securities, pursuant to such arrangement and to pay all such assessments, expenses, and sums of money as they may deem expedient for the protection of the interests of the Trust estate in stocks, bonds, or other securities, and generally to exercise with respect to all securities held by them all the same rights and powers as may be lawfully exercised by individual persons owning similar property in their own right.

15. The Trustees shall have the power to determine ac-
78 cording to their own judgment what is and what is not net income from this trust, and what is and what is not principal, and their decision in that respect shall be final and binding.

16. In case of the refusal or inability of any trustee to perform any duty under the Trusts hereby provided, the Trusteeship shall thereby be vacated as to such trustee and in such case or in case of the death or resignation of any trustee the remaining trustees shall have authority, and it shall be their duty, to appoint another trustee to fill the vacancy so caused so that at all times there may be three competent trustees. On of said Trustees, however, must always be a bank or trust company of the city of Chicago. If two vacancies occur at the same time, the surviving trustee may appoint two successor trustees. The appointment of new trustees and their acceptance shall be in writing.

In Witness Whereof the parties hereto have executed this agreement the day and year first above written.

Executed in tripulicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
KENNET G. SMITH (Seal)
DOUGLAS SMITH (Seal)
As Trustees.

Attest:
JAMES A. HENNING
(Seal) *Secretary.*

a

79 MODIFICATION OF JUNE TRUST

November 4th 1922

This Instrument, executed this 4th day of November 1922 by Douglas Smith of Chicago (hereinafter sometimes called the Grantor) and Foreman Bros. Banking Co. of Chicago, as Trustee,

Witnesseth That:

Whereas, by instrument dated September 25, 1922, the Grantor established a trust for the benefit of his daughter, June Keith Slater, known as the June Trust, under which Foreman Bros. Banking Co. of Chicago is one of the Trustees. Said trust agreement contains the following provision which appears as paragraph six thereof:

"Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors."

Pursuant to the above power and in accordance therewith said June Trust agreement is hereby modified in the following particular:

By striking out paragraph 11 thereof.

Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
As Trustee under the June Trust.

80 EXHIBIT "C"

Florence Trust

This Agreement, made this 25th day of September 1922 between Douglas Smith of Chicago (hereinafter sometimes called the Grantor), and Foreman Bros. Banking Co. of Chicago, Douglas Smith and Kenneth G. Smith of Chicago, as Trustees,

Witnesseth That:

It is the desire and intent of the Grantor to settle, assign, transfer and deliver certain securities of which he is now the owner and which are hereafter described, for the uses and purposes and upon the conditions hereafter set forth:

Now Therefore the said Grantor for and in consideration of love and affection and other good and valuable considerations and in consideration of the execution and performance of the Trust hereinafter declared, has assigned, transferred and delivered, and by these presents does assign, transfer and deliver unto Foreman Bros. Banking Co., Douglas Smith and Kenneth G. Smith as Trustees, and to their successors and assigns in said Trust, the following securities, to-wit:

Thirty (3) shares of the common capital stock of the Pepsodent Company, a corporation of Illinois.

Said thirty shares of stock together with all income therefrom and all cash, securities or other property that may hereafter be added thereto are to be held by said Trustees in a trust known as the Florence Trust for and upon the following uses, purposes and conditions:

1. Said Trustees are directed to collect the income and invest and reinvest the same from time to time until the
81 value thereof together with all accumulations and additions thereto amounts, in the opinion of a majority of the Trustees, to the sum of Three Hundred Thousand Dollars ($300,000.00).

2. When the property so accumulated in the Florence Trust has reached said amount of Three Hundred Thousand Dollars ($300,000.00) the net income therefrom, from that time forward, shall be paid in equal monthly installments to or for the account of Florence Gifford Ellis, the daughter of the Grantor, during her life.

3. Upon the death of said Florence Gifford Ellis accu-

mulation shall cease and the principal of this Trust shall go as said beneficiary may by last will in writing appoint, and failing appointment, shall be disposed of by said Trustee as follows:

a. If said Florence Gifford Ellis dies leaving issue, the principal of said Florence Trust shall become the property of such issue in equal shares, the income therefrom to be paid in equal parts to said issue until they respectively reach the age of twenty-one (21) years and as and when they respectively reach said age that part of the principal from which said issue have been so receiving income shall be delivered over to them respectively as their absolute property.

b. If she dies leaving no issue, the principal of the Trust shall go to increase equally two trusts created by instruments of even date herewith for the benefit of her brother and sister, one being known as the June Trust and the other as the Kenneth Trust.

4. All stock certificates, bonds and other securities and all evidence of title of trust property shall be deposited and remain with said Trustee, the Foreman Bros. Banking Co.

5. Said Trustees shall hold, manage and control the said Trust Estate and shall have full power to sell, assign, pledge, mortgage, transfer and deliver any or all of the properties and securities held by him as Trustees at such prices and upon such terms as in their discretion they may deem for
82 the best interests of the Estate. They are given full power and authority to invest and reinvest in such securities and in such manner as in their judgment is wise. Said Trustees are given as wide a latitude in the making of investments and as full power over the assets committed to their charge as if they were in fact the sole legal and equitable owners thereof. Save with the written approval of Douglas Smith, however, no sale shall be made of said Pepsodent stock by said Trustees for a period of fifteen years from the date of this instrument. In the event of Douglas Smith's death no such sale shall be made for five years thereafter without the written approval of Kenneth Smith.

6. Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith, and either one of the other two trustees or their successors.

7. Said Trustees shall collect the income, and after paying all necessary expenses, including a reasonable compensation to the Trustees and reimbursement of all expenses in-

curred in the administration of the Trust, including counsel fees when necessary, shall make disbursement in the manner hereinabove directed.

8. Payments shall be made only upon the personal receipt of the beneficiaries or their guardians. Any adult beneficiary of sound mind, however, may in writing appoint an agent to receive income which has become due. Such appointment shall not be valid for more than one year. No beneficiary shall have any right or authority to assign or anticipate any income or allowance or any disbursement of any part of the principal which he might be entitled to receive, under any of the provisions of said Trust, and no interest of the beneficiaries either in principal or income shall be alienable in any manner or to any extent for the obligations or liabilities, voluntary or involuntary, of such bene-
83 ficiaries or for any claims against them or any of them of whatsoever character.

9. If and when the Trustees are required to make any division or distribution said Trustees are authorized to make such division or distribution of any securities, property or cash as they may see fit, and for that purpose the value which said Trustees may place on the respective securities and properties shall be final and binding.

10. It shall not be the duty of the purchaser of any trust property to see to the application of the purchase money paid therefor nor shall any one who may deal with said Trustees be privileged or required to inquire into the necessity or expediency of any act of said Trustees or of the provisions of this instrument.

11. All taxes of whatsoever nature which are legally imposed upon or assessed against this trust or the income thereof, or against any beneficiary on account of said trust or the receipt of income therefrom, shall in each case be paid by the Trustees out of the income of this trust.

12. The Trustees shall have full power and authority to vote in any manner by them or a majority of them deemed proper any stock held as Trustees or in their discretion may vote such stock by proxy and are hereby duly authorized to execute and deliver any proxies for stock of any corporation held in trust hereunder. In voting such stock the Trustees shall have full discretion and power as though they were the holders of the same in their own right.

13. The Trustees shall have full power and authority to avail themselves in their discretion of any bond or stock subscription privileges which may at any time accrue to
84 them as the holders or owners of any securities of any corporation.

14. The Trustees in their discretion are hereby authorized to unite with other owners of property or securities similar to and held by them in trust hereunder in carrying out any plan for reorganization of any corporation or company whose securities form part of any of the trust estate; to exchange the securities of any corporation for others issued by the same or by any other corporation upon such terms as the Trustees shall deem proper; to assent to the consolidation or merger of any corporation whose securities are held by them with any other corporation; to the lease by such corporation of its property or any portion thereof to any other corporation, or to the lease by any other corporation of its property to such corporation; and upon any such consolidation, merger, lease or similar arrangement to exchange the securities held hereunder for other securities, pursuant to such arrangemnt and to pay all such assessments, expenses, and sums of money as they may deem expedient for the protection of the interests of the Trust estate in stocks, bonds, or other securities and generally to exercise with respect to all securities held by them all the same rights and powers as may be lawfully exercised by individual persons owning similar property in their own right.

15. The Trustees shall have the power to determine according to their own judgment what is and what is not net income from this trust, and what is and what is not principal, and their decision in that respect shall be final and binding.

16. In case of the refusal or inability of any trustee to perform any duty under the Trusts hereby provided, the Trusteeship shall thereby be vacated as to such trustee and in such case or in case of the death or resignation of any
85 trustee the remaining trustees shall have authority, and it shall be their duty to appoint another trustee to fill the vacancy so caused so that at all times there may be three competent trustees. One of said Trustees, however, must always be a bank or trust company of the city of Chicago. If two vacancies occur at the same time, the surviving trustee may appoint two successor trustees. The appointment of new trustees and their acceptance shall be in writing.

In Witness Whereof the parties hereto have executed this agreement the day and year first above written.
Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
KENNETH G. SMITH (Seal)
DOUGLAS SMITH (Seal)
As Trustees.

Attest:
JAMES A. HENNING
(Seal) *Secretary.*

86 MODIFICATION OF FLORENCE TRUST

November 4th, 1922

This Instrument, executed this 4th day of November 1922 by Douglas Smith of Chicago (hereinafter sometimes called the Grantor) and Foreman Bros. Banking Co. of Chicago, as Trustee,

Witnesseth That:

Whereas, by instrument dated September 25, 1922, the Grantor established a trust for the benefit of his daughter, Florence Gifford Ellis, known as the Florence Trust, under which Foreman Bros. Banking Co. of Chicago is one of the Trustees. Said trust agreement contains the following provision which appears as paragraph six thereof:

"Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors."

Pursuant to the above power and in accordance therewith said Florence Trust agreement is hereby modified in the following particular:

By striking out paragraph 11 thereof.
Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
As Trustee under the Florence Trust.

87 EXHIBIT "D."

Kenneth Trust.

This Agreement, made this 25th day of September, 1922, between Douglas Smith of Chicago (hereinafter sometimes called the Grantor), and Foreman Bros. Banking Co. of Chicago, Douglas Smith and Kenneth G. Smith of Chicago, as Trustees,

Witnesseth That:

It is the desire and intent of the Grantor to settle, assign, transfer and deliver certain securities of which he is now the owner, and which are hereafter described, for the uses and purposes and upon the conditions hereinafter set forth:

Now Therefore the said Grantor for and in consideration of love and affection and other good and valuable considerations and in consideration of the execution and performance of the Trusts hereinafter declared, has assigned, transferred and delivered, and by these presents does assign, transfer and deliver unto Foreman Bros. Banking Co., Douglas Smith and Kenneth G. Smith, as Trustees, and to their successors and assigns in said Trust, the following securities, to-wit:

One Hundred (100) shares of the common capital stock of the Pepsodent Company, a corporation of Illinois.

Said 100 shares of stock together with all income therefrom and all cash, securities or other property that may hereafter be added thereto are to be held by said Trustees in a trust to be known as the Kenneth Trust for and upon the following uses, purposes and conditions:

1. The net income from said Kenneth Trust shall be paid to said Kenneth C. Smith in monthly installments until he attains the age of forty (40) years, at which time the principal of said Trust shall be delivered to him as his absolute property.

2. If said Kenneth G. Smith dies before reaching the
88 age of forty years, the principal of said Kenneth Trust shall be paid over and delivered in such manner as said Kenneth G. Smith shall by his last will in writing appoint, and failing such appointment, shall be disposed of by said Trustees as follows:

a. If he dies leaving issue and a widow, one-third of said principal shall become absolutely the property of such widow, the remaining two-thirds of said principal shall become the

property of the issue of said Kenneth G. Smith in equal shares; the income therefrom to be paid in equal parts to said issue until they respectively reach the age of twenty-one (21) years. As and when such issue respectively reach the age of twenty-one years that part of the principal from which said issue have been so receiving income shall be paid over to them, respectively, as their absolute property.

b. If he dies leaving issue but no widow the provision for the disposition of two-thirds of said principal in the preceding paragraph shall govern the disposition of the entire principal.

c. If he dies without issue but leaving a widow, one-half of the principal shall become absolutely the property of said widow and the remaining half shall go to increase equally two trusts created by instruments of even date herewith for the benefit of the daughters of the Grantor, one being known as the Florence Trust and the other as the June Trust.

d. If he dies without issue and leaving no widow the entire principal shall go to increase equally the Florence Trust and the June Trust.

3. All stock certificates, bonds and other securities and all evidences of title of trust property shall be deposited and remain with said Trustee, the Foreman Bros. Banking Co.

4. Said Trustees shall hold, manage and control the said Trust Estate and shall have full power to sell, assign, pledge, mortgage, transfer and deliver any or all of the properties and securities held by them as Trustees at such prices and upon such terms as in their discretion they may deem for the best interests of the Estate. They are given full power and authority to invest and reinvest in such securities and in such manner as in their judgment is wise. Said Trustees are given as wide a latitude in the making of investment and as full
89 power over the assets committed to their charge as if they were in fact the sole legal and equitable owners thereof. Save with the written approval of Douglas Smith, however, no sale shall be made of said Pepsodent stock by said Trustees for a period of fifteen years from the date of this instrument. In the event of Douglas Smith's death no such sale shall be made for five years thereafter without the written approval of Kenneth G. Smith.

5. Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith, and either one of the other two trustees or their successors.

6. Said Trustees shall collect the income, and after paying all necessary expenses, including a reasonable compensation to the Trustees and reimbursement of all expenses incurred in the administration of the Trust, including counsel fees when necessary, shall make disbursement in the manner hereinabove directed.

7. Payments shall be made only upon the personal receipt of the beneficiaries or their guardians. Any adult beneficiary of sound mind, however, may in writing appoint an agent to receive income which has become due. Such appointment shall not be valid for more than one year. No beneficiary shall have any right or authority to assign or anticipate any income or allowance of any disbursement of any part of the principal which he might be entitled to receive, under any of the provisions of said Trust, and no interest of the beneficiaries either in principal or income shall be alienable in any manner or to any extent for the obligations or liabilities, voluntary or involuntary, of such beneficiaries or for any claims against them or any of them of whatsoever character.

8. If and when the Trustees are required to make any division or distribution said Trustees are authorized to make such division or distribution of any securities, property or
90 cash as they may see fit, and for that purpose the value which said Trustees may place on the respective securities and properties shall be final and binding.

9. It shall not be the duty of the purchaser of any trust property to see to the application of the purchase money paid therefor nor shall any one who may deal with said Trustees be privileged or required to inquire into the necessity or expediency of any act of said Trustees or of the provisions of this instrument.

10. All taxes of whatsoever nature which are legally imposed upon or assessed against this trust or the income thereof or against any beneficiary on account of said trust or the receipt of income therefrom, shall in each case be paid by the Trustees out of the income of this trust.

11. The Trustees shall have full power and authority to vote in any manner by them or a majority of them deemed proper any stock held as Trustees or in their discretion may vote such stock by proxy and are hereby duly authorized to execute and deliver any proxies for stock of any corporation held in trust hereunder. In voting such stock the Trustees shall have full discretioi and power as though they were the holders of the same in their own right.

12. The Trustees shall have full power and authority to avail themselves in their discretion of any bond or stock subscription privileges which may at any time accrue to them as the holders or owners of any securities of any corporation.

13. The Trustees in their discretion are hereby authorized to unite with other owners of property or securities similar to any held by them in trust hereunder in carrying out any plan for reorganization of any corporation or company whose securities form part of any of the trust estate; to exchange the securities of any corporation for others issued by the
91 same or by any other corporation upon such terms as the Trustees shall deem proper; to assent to the consolidation or merger of any corporation whose securities are held by them with any other corporation; to the lease by such corporation of its property or any portion thereof to any other corporation, or to the lease by any other corporation of its property to such corporation; and upon any such consolidation, merger, lease or similar arrangement, to exchange the securities held hereunder for other securities, pursuant to such arrangement; and to pay all such assessments, expenses, and sums of money as they may deem expedient for the protection of the interests of the Trust estate in stocks, bonds, or other securities, and generally to exercise with respect to all securities held by them all the same rights and powers as may be lawfully exercised by individual persons owning similar property in their own right.

14. The Trustee shall have the power to determine according to their own judgment what is and what is not net income from this trust, and what is and what is not principal, and their decision in that respect shall be final and binding.

15. In case of the refusal or inability of any trustee to perform any duty under the Trusts hereby provided, the Trusteeship shall thereby be vacated as to such trustee and in such case or in case of the death or resignation of any trustee the remaining trustees shall have authority, and it shall be their duty, to appoint another trustee to fill the vacancy so caused so that at all times there may be three competent trustees. One of said trustees, however, must always be a bank or trust company of the City of Chicago. If two vacancies occur at the same time, the surviving trustee may appoint two successor trustees. The appointment of new trustees and their acceptance shall be in writing.

92 In Witness Whereof the parties hereto have executed this agreement the date and year first above written. Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
KENNETH G. SMITH (Seal)
DOUGLAS SMITH (Seal)
As Trustees.

Attest:
JAMES A. HENNING,
(Seal) *Secretary.*

93 MODIFICATION OF KENNETH TRUST.

November 4th, 1922.

This Instrument executed this 4th day of November 1922 by Douglas Smith of Chicago (hereinafter sometimes called the Grantor) and Foreman Bros. Banking Co. of Chicago, as Trustee, Witnesseth That:

Whereas, by instrument dated September 25, 1922, the Grantor established a trust for the benefit of his son, Kenneth G. Smith, known as the Kenneth Trust, under which Foreman Bros. Banking Co. of Chicago is one of the Trustees. Said trust agreement contains the following provision which appears as paragraph 5 thereof:

"Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors."

Pursuant to the above power and in accordance therewith said Kenneth Trust agreement is hereby modified in the following particulars:

By striking out paragraph 10 thereof.

Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
As Trustees under the Kenneth Trust.

94 EXHIBIT "E."

General Trust.

This Agreement made this 30th day of October, 1922, between Douglas Smith of Chicago (hereinafter sometimes called Grantor) and Foreman Bros. Banking Co. of Chicago, Douglas Smith and Kenneth G. Smith of Chicago as Trustees,

Witnesseth That:

Whereas, by instruments dated September 25, 1922, the Grantor established three trusts, one, the Emaroy Trust, for the benefit of his wife; another, the June Trust, for the benefit of his daughter, June Keith Slater; and another, the Florence Trust, for the benefit of his daughter, Florence Gifford Ellis; and it is his intention that the principal of said trusts be increased and the income thereof accumulated until certain principal amounts therein named have been reached, the income from which will in Grantor's opinion be adequate for the purposes he has in mind;

And Whereas, it is the desire and intent of the Grantor that until said trusts respectively reach the amount so contemplated for them, his wife and daughters shall receive definite incomes and especially that his wife may be enabled to live in a manner in keeping with the present circumstances of the Grantor;

And Whereas, a trust known as the Kenneth Trust has been established for the benefit of Grantor's son, Kenneth G. Smith;

Now, Therefore, the said Grantor for and in consideration of love and affection and other good and valuable considerations, has assigned, transferred and delivered, and by these presents does assign, transfer and deliver unto Foreman
95 Bros. Banking Co., Douglas Smith and Kenneth G. Smith, as Trustees, and to their successors and assigns in this Trust, the following securities, to wit:

Five Hundred Thirty-nine (539) shares of the common capital stock of the Pepsodent Company, a corporation of Illinois. Said 539 shares of stock together with all income therefrom and any cash, securities or any other property that may hereafter be added thereto are to be held by said Trustees in a trust to be known as the General Trust for and upon the following uses, purposes and conditions:

1. From the net income of said Trust there shall be paid:

a. To or for the account of Emaroy J. Smith, the wife of the Grantor, Three Thousand Dollars ($3,000) in each month during her life or until the establishment of the full principal of the Emaroy Trust.

b. To or for the account of June Keith Slater, daughter of the Grantor, Nine Hundred Dollars ($900) in each month during her life or until the establishment of the full principal of the June Trust.

c. To or for the account of Florence Gifford Ellis, daughter of the Grantor, Nine Hundred Dollars ($900) in each month during her life or until the establishment of the full principal of the Florence Trust.

Should the net income of this trust be insufficient to make the foregoing payments, the Trustees are directed to abate said payments proportionately.

2. The balance of the net income from said General Trust shall be paid over in quarterly installments as follows:

5/11s thereof to Foreman Bros. Banking Co., Douglas Smith and Kenneth G. Smith, as trustees of the Emaroy Trust;

3/11s thereof to them as Trustees of the June Trust;

3/11s thereof to them as Trustees of the Florence Trust.

96 Such payments are to continue until the property held by said Trustees together with its accumulations and additions, amounts in value in the opinion of the majority of said Trustees, in the case of the Emaroy Trust to Five Hundred Thousand Dollars ($500,000) and in the case of the June and Florence Trust to Three Hundred Thousand Dollars ($300,000) each.

Provided, however, that in the event of the death of Grantor's said wife or in the event of the death of either of said daughters, with or without children, prior to the completion of the Trust so established for her benefit, no further payments shall be made to the Trust created for the benefit of the person so dying; and the share of the income which would otherwise have gone to the Trust established for the benefit of the persons so dying shall (subject to the provision hereinafter made) be apportioned between the Trusts created for the benefit of the survivors of said three beneficiaries in accordance with the proportions hereinabove set forth. For example, if the survivors are the wife and one daughter, the apportionment will be five parts to the Emaroy Trust and three parts to the Trust for the daughter; if the two daughters are the survivors the apportionment will be in equal parts between their respective trusts.

3. In the event of the death of either of said daughters prior to the establishment of the full principal of the said trust created for her benefit, leaving Children her surviving, the trustees shall set aside a portion of the principal of this General Trust in value sufficient in the opinion of the majority of said trustees, together with the value of the principal of the trust for the benefit of the daughter so dying as it stood at the time of her death, to make up a total of $300,000.
97 The portion so set aside is hereinafter referred to as the Supplemental Fund. The income from such Supplemental Fund shall be paid in equal shares to or for the benefit of the children of the daughter so dying, during their lives or until they respectively attain the age of twenty-one years. As and when said children respectively attain the age of twenty-one years that part of the principal of said Supplemental Fund from which said children have been so receiving income shall be delivered over to them respectively as their absolute property. For example, if the children of a daughter so dying were three in number, each would receive one-third of the income from such Supplemental Fund during his life or until he reached the age of twenty-one years and at the time of reaching that age would receive one-third of the principal of such Supplemental Fund. If any of said children so receiving income from such Supplemental Fund should die before attaining the age of twenty-one years, the share of the income which would otherwise have gone to the child so dying shall be apportioned equally between his surviving brothers and sisters. Should all of said children die before attaining the age of twenty-one years, the entire Supplemental Fund shall be disposed of in like manner as the principal of this General Trust is disposed of under paragraph 4 hereof.

4. Upon the establishment of the full principal of the Emaroy, June and Florence Trusts—or if payments to any of said Trusts have terminated as above provided, then upon establishment of the full principal of the Trusts for the survivors of said three beneficiaries—the Trustees, retaining only the Supplemental Fund or Funds (if any have been set aside in accordance with the provisions of Paragraph 3 hereof) shall deliver the principal of this General Trust to the Kenneth Trust. If at such time Kenneth G. Smith has attained
98 forty (40) years of age, they shall make delivery to him personally. If he be not then living, the principal of this Trust, subject only to the reservation, if any, for Supplemental Funds, shall be disposed of in like manner and subject to

the same power of appointment as has been provided for the principal of said Kenneth Trust.

5. All stock certificates, bonds and other securities and all evidences of title of trust property shall be deposited and remain with said Trustee, the Foreman Bros. Banking Co.

6. Said Trustees shall hold, manage and control the said Trust Estate and shall have full power to sell, assign, pledge, mortgage, transfer and deliver any or all of the properties and securities held by them as Trustees at such prices and upon such terms as in their discretion they may deem for the best interests of the Estate. They are given full power and authority to invest and reinvest in such securities and in such manner as in their judgment is wise. Said Trustees are given as wide a latitude in the making of investment and as full power over the assets committed to their charge as if they were in fact the sole legal and equitable owners thereof. Save with the written approval of Douglas Smith, however, no sale shall be made of said Pepsodent stock by said Trustees for a period of fifteen years from the date of this Instrument. In the event of Douglas Smith's death no such sale shall be made for five years thereafter without the written approval of Kenneth G. Smith.

7. Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith, and either one of the other two trustees or their successors.

8. Said Trustees shall collect the income, and after paying all necessary expenses, including a reasonable com-
99 pensation to the Trustees and reimbursement of all expenses incurred in the administration of the Trust, including counsel fees when necessary, shall make disbursements in the manner hereinabove directed.

9. Payments shall be made only upon the personal receipt of the beneficiaries or their guardians. Any adult beneficiary of sound mind, however, may in writing appoint an agent to receive income which has become due. Such appointment shall not be valid for more than one year. No beneficiary shall have any right or authority to assign or anticipate any income or allowance of any disbursement of any part of the principal which he might be entitled to receive, under any of the provisions of said Trust, and no interest of the beneficiaries either in principal or income shall be alienable in any manner or to any extent for the obligations or liabilities, vol-

untary or involuntary, of such beneficiaries or for any claims against them or any of them of whatsoever character.

10. If and when the Trustes are required to make any division or distribution said Trustees are authorized to make such division or distribution of any securities, property or cash as they may see fit, and for that purpose the value which said Trustees may place on the respective securities and properties shall be final and binding.

11. It shall not be the duty of the purchaser of any trust property to see to the application of the purchase money paid therefor nor shall any one who may deal with said Trustees be privileged or required to inquire into the necessity or expediency of any act of said Trustees or of the provisions of this instrument.

12. The Trustees shall have full power and authority to vote in any manner by them or a majority of them deemed
100 proper any stock held as Trustees or in their discretion may vote such stock by proxy and are hereby duly authorized to execute and deliver any proxies for stock of any corporation held in trust hereunder. In voting such stock the Trustees shall have full discretion and power as though they were the holders of the same in their own right.

13. The Trustees shall have full power and authority to avail themselves in their discretion of any bond or stock subscription privileges which may at any time accrue to them as the holders or owners of any securities of any corporation.

14. The Trustees in their discretion are hereby authorized to unite with other owners of property or securities similar to any held by them in trust hereunder in carrying out any plan for reorganization of any corporation or company whose securities form part of any of the Trust Estate; to exchange the securities of any corporation for others issued by the same or by any other corporation upon such terms as the Trustees shall deem proper; to assent to the consolidation or merger of any corporation whose securities are held by them with any other corporation; to the lease by such corporation of its property or any portion thereof to any other corporation, or to the lease by any other corporation of its property to such corporation; and upon any such consolidation, merger, lease or similar arrangement to exchange the securities held hereunder for other securities, pursuant to such arrangement; and to pay all such assessments, expenses, and sums of money as they may deem expedient for the protection of the interests of the Trust Estate in stocks, bonds or other securities, and gen-

erally to exercise with respect to all securities held by them all the same rights and powers as may be lawfully exer-
101 cised by individual persons owning similar property in their own right.

15. The Trustees shall have the power to determine according to their own judgment what is and what is not net income from this Trust, and what is and what is not principal, and their decision in that respect shall be final and binding.

16. In case of the refusal or inability of any Trustee to perform any duty under the Trusts hereby provided, the Trusteeship shall thereby be vacated as to such trustee and in such case or in the case of the death or resignation of any trustee the remaining trustees shall have authority, and it shall be their duty, to appoint another trustee to fill the vacancy so caused so that at all times there may be three competent trustees. One of said Trustees, however, must always be a bank or trust company of the City of Chicago. If two vacancies occur at the same time, the surviving trustee may appoint two successor trustees. The appointment of new trustees and their acceptance shall be in writing.

In Witness Whereof the parties hereto have executed this agreement the day and year first above written.

Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer

Attest:
JAMES A. HEMINGWAY.

DOUGLAS SMITH (Seal)
KENNETH G. SMITH (Seal)
As Trustees.

102 And on to wit the 9th day of October, 1930 being one of the days of the regular October Term of said Court in the record of proceedings thereof in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry to wit:

103 * * (Caption) * *

Thursday, October 9, 1930.

Present Honorable George A. Carpenter, Judge of said Court.

On stipulation of the parties to this suit filed herein It Is Ordered that the time within which the defendant is to file her plea, answer or demurrer be and the same is hereby extended to and including November 9, A. D. 1930.

104 And on to wit the 10th day of November, 1931 came the Defendant by her attorney and filed in the Clerk's Office of said Court a certain Plea in words and figures following to wit:

105 * * (Caption) * *

PLEA.

And now comes the defendant, Mabel G. Reinecke, by George E. Q. Johnson, United States Attorney for the Northern District of Illinois, her attorney, and as to the said declaration and each count thereof defends the wrong and injury, when, etc., and says that she did not promise in manner and form as the plaintiff has above thereof complained against her; and of this she puts herself upon the country, etc.

GEORGE E. Q. JOHNSON,
United States Attorney.

106 And on to wit the 28th day of November, 1930 came the parties to this suit by their attorneys and filed in the Clerk's Office of said Court a certain Stipulation in words and figures following to wit:

107 * * (Caption) * *

STIPULATION.

It is hereby stipulated and agreed by and between the parties, by their respective attorneys, that the plea heretofore filed by the defendant may be withdrawn and a demurrer filed in lieu thereof.

HOPKINS, STARR & HOPKINS
BURRY, JOHNSTONE, PETERS & DIXON
Attorneys for Plaintiff.
GEORGE E. Q. JOHNSON
United States Attorney for the Northern District of Illinois, Attorney for Defendant.

108 And on to wit the 28th day of November, 1930 being one of the days of the regular November Term of said Court in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry to wit:

109 * * (Caption) * *

Friday, November 28, 1930.

Present: Honorable George A. Carpenter, Judge of said Court.

On stipulation of the parties to this suit filed herein It Is Ordered that leave be and the same is hereby given the Defendant to withdraw her plea filed in said cause and leave be and the same is hereby given the Defendant to file Demurrer in the above entitled cause.

110 And on to with the 28th day of November, 1930 came the Defendant by her attorney and filed in the Clerk's Office of said Court a certain Demurrer in words and figures following, to wit:

111 * * (Caption) * *

DEMURRER.

And the defendant by George E. Q. Johnson, United States Attorney for the Northern District of Illinois, her attorney, comes and defends, et cetera, when, et cetera, and says that the said declaration and each count thereof and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiffs to maintain their aforesaid action and that she, the defendant, is not bound by law to answer the same; and this she is ready to verify; Wherefore for want of a sufficient declaration in this behalf, the defendant prays judgment, and that the plaintiffs may be barred from maintaining their aforesaid action, et cetera.

GEORGE E. Q. JOHNSON
United States Attorney for the Northern District of Illinois.

112 And on to wit the 22nd day of June, 1931 being one of the days of the regular June Term of said Court in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry to wit:

113 * * (Caption) * *

Monday, June 22, 1931.

Present: Honorable George A. Carpenter, Judge of said Court.

This cause coming on to be heard upon the defendant's demurrer to the plaintiff's declaration filed in said cause and after arguments of counsel and due deliberation by the court said demurrer is overruled and thirty (30) days time from this date is allowed the defendant within which to elect to plead or stand by her demurrer.

114 And on to wit the 28th day of July, 1931 being one of the days of the regular July Term of said Court in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry to wit:

115 * * (Caption) * *

ORDER.

This matter coming on before the court for further proceedings, the plaintiffs being represented by Hopkins, Sutter, Halls & DeWolfe and Burry, Johnstone, Peters and Dixon of Chicago, Illinois, and the defendant by George E. Q. Johnson, United States Attorney for the Northern District of Illinois, and the court having heretofore, on June 22, A. D. 1931, overruled the defendant's demurrer as to each and every count of the plaintiffs' declaration and having given the defendant thirty (30) days from said date in which to elect whether to plead over or stand on her said demurrer, and the defendant, by her attorney, having this day in open court elected to stand on her said demurrer and having refused to plead over, and the plaintiffs being now entitled to have judgment entered for them and against the defendant;

Now, Therefore, It Is Ordered, Adjudged and Decreed that the plaintiffs do recover of the defendant the sum of Fifty-
116 nine Thousand Eight Hundred Ninety-six Dollars Fifty-one Cents ($59,896.51), together with interest thereon at the rate of six per centum (6%) per annum, upon Thirty Thousand Three Hundred Thirteen Dollars Ninety-nine Cents ($30,313.99) thereof from December 15, 1925, and upon the balance thereof, in the sum of Twenty-nine Thousand Five Hundred Eighty-two Dollars Fifty-two Cents ($29,582.52), from September 15, 1925, to a date preceding the date of the refund check to be issued in payment of this judgment by not more than thirty (30) days, such date to be determined by the Commissioner of Internal Revenue, all as provided by law.

Enter:

JOHN P. BARNES
Judge.

Dated this 28th day of July, A. D. 1931.

117 And on to wit the 28th day of July, 1931 being one of the days of the regular July Term of said Court in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry to wit:

118 * * (Caption) * *

CERTIFICATE OF PROBABLE CAUSE.

It is hereby certified that the Collector of Internal Revenue for the First District of Illinois, defendant herein, had probable cause for making the assessment and levying the tax upon which the findings and judgment herein are based.

JOHN P. BARNES
Judge.

Dated July 28th, A. D. 1931.

119 And on to wit the 23rd day of October, 1931 came the defendant by her attorney and filed in the Clerk's Office of said Court a certain Notice in words and figures following to wit:

120 * * (Caption) * *

To: Hopkins, Starr & Hopkins,
110 So. Dearborn St.,
Burry, Johnstone, Peters & Dixon,
105 So. La Salle St.,
Chicago, Illinois.
Attorneys for Plaintiffs.

NOTICE.

You and each of you are hereby notified that on Friday, October 23, 1931, at the opening of court in the forenoon, or as soon thereafter as counsel can be heard, I shall appear before his Honor, Judge Charles E. Woodward, in the room regularly occupied by him as a court room in the Federal Building at Chicago, Illinois, and ask leave of court to file the petition of Mabel G. Reinecke, defendant, for an appeal, together with an assignment of errors, and shall enter the

motion of the defendant, Mabel G. Reinecke, formerly Collector of Internal Revenue for the First Collection District of Illinois, for the issuance and allowance of an appeal directed to the United States Circuit Court of Appeals for the Seventh Circuit, and for the issuance of a citation to
121 the above named plaintiffs in accordance with said appeal, at which time and place you may appear if you so desire.

GEORGE E. Q. JOHNSON
United States Attorney for the Northern District of Illinois.
Attorney for Defendant.

Received a copy of the above and foregoing notice this ..... day of October, A. D. 1931.

BURRY, JOHNSTONE, PETERS & DIXON
HOPKINS, SUTTER, HALLS & DEWOLFE
Attorneys for Plaintiffs.

122 And on to wit the 23rd day of October, 1931 came the defendant by her attorney and filed in the Clerk's Office of said Court a certain Petition for Appeal in words and figures following to wit:

123 * * (Caption) * *

PETITION FOR APPEAL.

Now comes Mabel G. Reinecke, formerly Collector of Internal Revenue for the First Collection District of Illinois, the defendant, by her attorney, George E. Q. Johnson, United States Attorney for the Northern District of Illinois, and respectfully shows that on the 28th day of July, A. D. 1931, the court having overruled the demurrer of the defendant to the declaration of the plaintiffs, entered judgment for the plaintiffs upon said demurrer and against the defendant, your petitioner.

Your petitioner feeling herself aggrieved by said judgment and pursuant to the authority and direction of the Attorney General of the United States herewith petitions the court for an order allowing her to prosecute an appeal to the United States Circuit Court of Appeals for the Seventh Circuit under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that an appeal in this behalf be allowed to the United States
124 Circuit Court of Appeals for the Seventh Circuit, sitting in Chicago, Illinois, in said Circuit, for the correction of the errors complained of and herein assigned, and that an order be entered allowing said appeal without bond of the defendant, it appearing that this cause is one in which the United States is the real party in interest and that this petition for appeal is filed pursuant to the authority and direction of the Attorney General of the United States.

GEORGE E. Q. JOHNSON
United States Attorney for the Northern District of Illinois.
Attorney for Defendant.

Dated at Chicago, Illinois, this 23rd day of October, A. D. 1931.

125 And on to wit the 23rd day of October, 1931 came the defendant by her attorney and filed in the Clerk's Office of said Court a certain Assignment of Errors in words and figures following to wit:

126 * * (Caption) * *

ASSIGNMENT OF ERRORS.

Now comes the defendant, Mabel G. Reinecke, formerly Collector of Internal Revenue for the First Collection District of Illinois, by George E. Q. Johnson, United States Attorney for the Northern District of Illinois, her attorney, and by direction and authority of the Attorney General of the United States is about to file a petition for an appeal from the judgment of this court rendered on the 28th day of July, A. D. 1931, in this cause, and in connection with her petition for appeal says that in the record proceedings and in the final judgment aforesaid manifest error has intervened to the prejudice of the defendant, to wit:

1. Said District Court erred in overruling the demurrer of the defendant to the declaration of the plaintiffs and in entering judgment upon the said demurrer for the plaintiffs.

2. Said District Court erred in refusing to sustain the demurrer of the defendant to the declaration of the plaintiffs.

3. Said District Court erred in holding as a matter of law that the declaration stated a good cause of action and that the plaintiffs upon the face of said declaration were entitled to judgment.

4. Said District Court erred in refusing to hold as a matter of law that the income from the several trusts men-
127 tioned in the several counts of the declaration was legally and constitutionally taxable to the plaintiff's testator, Douglas Smith, under paragraph (g) of Section 219 of the Revenue Act of 1924.

Wherefore, defendant, appellant prays that the judgment of the said District Court be reversed, etc.

GEORGE E. Q. JOHNSON,
United States Attorney for the Northern District of Illinois, Attorney for defendant.

Dated at Chicago, Illinois, this 23rd day of October, A. D. 1931.

128 And on to wit the 23rd day of October 1931 being one of the days of the regular October Term of said Court in the record of proceedings thereof, in said entitled cause, before the Honorable Walter C. Lindley, District Judge, appears the following entry to wit:

129 * * (Caption) * *

ORDER.

This cause coming on to be heard this 23rd day of October, A. D. 1931, on the petition of Mabel G. Reinecke, formerly Collector of Internal Revenue for the First Collection District of Illinois, defendant, and the said defendant appearing by her attorney, George E. Q. Johnson, United States Attorney for the Northern District of Illinois, for an order allowing her to prosecute an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and an assignment of errors accompanying the said petition, and it appearing that notice of this proceeding has been given to the plaintiffs:

It is ordered in open court that the prayer of said petitioner be, and it is hereby, allowed, and the appeal prayed for by said petitioner is hereby granted and allowed without bond of the defendant, it appearing that this cause is one in which the United States is the real party in interest and that this ap-

peal is being taken by the direction and authority of the
130 Attorney General of the United States of America.

Enter:

WALTER C. LINDLEY
Judge of the District Court for the Northern District of Illinois, Eastern Division.

Dated this 23rd day of October, A. D. 1931.

131 And afterwards, to wit, on the 21st day of November 1931, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appears the following entry, to wit:

132 * * (Caption) * *

Saturday, November 21, 1931.

Present: Honorable James H. Wilkerson, Judge of said Court.

On stipulation of the parties to this suit filed herein
It Is Ordered that the time within which the Defendant is to file Transcript of Record with the Clerk of the Circuit Court of Appeals for the Seventh Circuit and for docketing the cause in the office of said Clerk be and the same is hereby extended to and including November 27, 1931.

133 * * (Caption) * *

PRAECIPE FOR TRANSCRIPT OF RECORD.

To: Charles M. Bates, Esq., Clerk of the District Court of the United States, for the Northern District of Illinois, Eastern Division.

You will please prepare a transcript of the record in the above entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit in the appeal heretofore allowed in said cause, and include in said transcript the following:

1. Placita.
2. Declaration.

3. Order of October 9, 1930, extending, pursuant to stipulation, the time for defendant to plead to and including November 9, 1930.
4. Plea of defendant.
5. Stipulation providing for withdrawal by defendant of plea and filing of a demurrer in lieu thereof.
6. Order of November 28, 1930, giving leave to defendant to withdraw plea and file demurrer.
7. Demurrer.

134 8. Order of June 22, 1931, overruling demurrer of defendant and allowing defendant 30 days to elect to plead over or to stand on demurrer.

9. Judgment order of July 28, 1931.
10. Certificate of probable cause.
11. Notice of petition for appeal.
12. Petition for appeal.
13. Assignment of errors.
14. Order allowing appeal without bond.
15. Citation with acknowledgment of service.
16. Praecipe for transcript of record.
17. Notice of filing praecipe.
18. Clerk's certificate.

Said transcript is to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Seventh Circuit.

GEORGE E. Q. JOHNSON
United States Attorney for the Northern District of Illinois, Eastern Division, Attorney for Defendant.

Endorsed: Filed November 12, 1931. Charles M. Bates, Clerk.

135 Northern District of Illinois } ss:
Eastern Division }

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled Kenneth G. Smith and Foreman-State Trust and Savings

Bank, a banking corporation, Executors of the Will of Douglas Smith, Deceased vs. Mabel G. Reinecke, etc. No. 38956 as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 27th day of November, A. D. 1931.

CHARLES M. BATES,
Clerk.

(Seal)

136 United States of America } ss.

The President of the United States, To Kenneth G. Smith and Foreman-State Trust & Savings Bank, Executors of the Will of Douglas Smith, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to the appeal allowed and filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Mabel G. Reinecke, formerly Collector of Internal Revenue for the First District of Illinois is appellant and you are appellees to show cause, if any there be, why the judgment rendered against the said Mabel G. Reinecke as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter C. Lindley Judge of the District Court of the United States, for the Northern District of Illinois, this 23rd day of October, in the year of our Lord one thousand nine hundred and thirty-one.

WALTER C. LINDLEY,
Judge.

Service is hereby acknowledged of the above citation this 27 day of October, A. D. 1931.

BURRY, JOHNSTONE, PETERS & DIXON,
HOPKINS, SUTTER, HALLS & DEWOLFE,
Attorneys for Plaintiffs.

(Endorsed) * * (Caption) * * Citation. Filed Oct. 27, 1931. Charles M. Bates, Clerk. George E. Q. Johnson (Green) U. S. Atty.

1 At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States courtroom in the city of Chicago, in said Seventh Circuit, on the sixth day of October, 1931, of the October term in the year of our Lord one thousand nine hundred and thirty-one, and of our independence the one hundred and fifty-sixth.

4692

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR the First District of Illinois, appellant

vs.

KENNETH G. SMITH, AND FOREMAN-STATE TRUST AND SAVINGS BANK, Executors of the Will of Douglas Smith, appellees

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

And afterwards, to wit, on the first of December, 1931, there was filed in the office of the clerk of this court the appearance of counsel for appellant, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 4692. October term, 1931

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE, appellant

vs.

KENNETH G. SMITH AND FOREMAN-STATE TRUST & SAVINGS BANK, Executors of the Will of Douglas Smith, appellees

The clerk will enter appearances as counsel for appellant.

GEORGE E. Q. JOHNSON,
United States Attorney.
JOHN POTTS BARNES,
Special Attorney, Bureau of Internal Revenue.

(Endorsed:) Filed December 1, 1931. Frederick G. Campbell, clerk.

2 And afterwards, to wit, on the second of December, 1931, there was filed in the office of the clerk of this court an appearance for counsel for appellees, which said appearance is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit

No. 4692. October term, 1931

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE, Appellant

vs.

KENNETH G. SMITH AND FOREMAN-STATE TRUST & SAVINGS BANK, Executors of the Will of Douglas Smith, Appellees

The clerk will enter my appearance as counsel for appellees.

BRUCE JOHNSTONE,
105 S. LaSalle St., Chicago, Illinois

(Endorsed): Filed December 2, 1931. Frederick G. Campbell, clerk.

And on the same day, to wit, on the second of December, 1931, there was filed in the office of the clerk of this court an appearance for counsel for appellees, which said appearance is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit

No. 4692. October term, 1931

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE, Appellant

vs.

KENNETH G. SMITH AND FOREMAN-STATE TRUST & SAVINGS BANK, Executors of the Will of Douglas Smith, Appellees

The clerk will enter our appearance as counsel for appellees.

ALBERT L. HOPKINS,
HARRY B. SUTTER,
ANDERSON A. OWEN,
3315 One North LaSalle Street, Chicago.

(Endorsed:) Filed December 2, 1931. Frederick G. Campbell, clerk.

3 And afterwards, to wit, on the twelfth of April, 1932, the following further proceedings were had and entered of record, to wit: Tuseday April 12, 1932, court met pursuant to adjournment and was opened by proclamation of crier.

Present Hon. Samuel Alschuler, circuit judge, presiding; Hon. Evan A. Evans, circuit judge; Hon. William M. Sparks, circuit

judge; Frederick G. Campbell, clerk; Henry C W. Laubenheimer, marshal.

4692

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE, APPELLANT *vs.* KENNETH G. SMITH AND FOREMAN-STATE TRUST & SAVINGS BANK, EXECUTORS OF THE WILL OF DOUGLAS SMITH, APPELLEES	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

It is ordered by the court that this cause be, and the same is hereby set down for hearing on April 29, 1932.

And afterwards, to wit, on the twenty-ninth of April, 1932, the following further proceedings were had and entered of record, to wit: Friday, April 29, 1932, court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Samuel Alschuler, circuit judge, presiding; Hon. Evan A. Evans, circuit judge; Hon. William M. Sparks, circuit judge; Hon. James H. Wilkerson, district judge; Frederick G. Campbell, clery; Henry C. W. Laubenheimer, marshal.

4 Before Hon. SAMUEL ALSCHULER, *Circuit Judge*, *Hon.* WILLIAM M. SPARKS, *Circuit Judge*, Hon. JAMES H. WILKERSON, *District Judge*.

4692

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE, APPELLANT *vs.* KENNETH G. SMITH AND FOREMAN-STATE TRUST & SAVINGS BANK, EXECUTORS OF THE WILL OF DOUGLAS SMITH, APPELLEES	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. John Potts Barnes, counsel for appellant, and by Mr. Albert L. Hopkins, counsel for appellee, and the court having heard the same takes this matter under advisement.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States courtroom in the city of Chicago, in said Seventh Circuit, on the fourth day of October, 1932, of the October term in the year of our Lord one thousand nine hundred and thirty-two, and of our independence the one hundred and fifty-seventh.

5 And afterwards, to wit: On the seventh of October, 1932, there was filed in the office of the Clerk of this court the opinion of the court, which said opinion is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 4692. October term and session, 1932

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, Appellant *vs.* KENNETH G. SMITH, AND FOREMAN STATE TRUST & SAVINGS BANK, EXECUTORS OF THE WILL OF DOUGLAS SMITH, Appellees.	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

October 7, 1932

Before ALSCHULER and SPARKS, *Circuit Judges*, and WILKERSON, *District Judge*.

The appeal is from a judgment for the recovery of income taxes paid under protest by Douglas Smith, now deceased. In 1922 Smith created five trusts for the benefit of his wife and children. Each trust agreement named as trustees Foreman Bros. Banking Company, Kenneth Smith, and the grantor. Kenneth Smith was a beneficiary under each trust. Douglas Smith, the grantor, was not a beneficiary under any of the trusts.

Each of the trusts contained a provision that "this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors." The revenue act of 1924, approved June 2, 1924 (section 219 (g)), 43 Stat. 275, 277, contained the following: "(g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the
6 corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

On October 22, 1924, Douglas Smith resigned as trustee and the trust agreements were modified by striking out the provision for the modification or revocation of the trust.

The income of the five trusts for the year 1924 was distributed by the trustees and received by the beneficiaries in accordance with the provisions of the trust agreements. Douglas Smith did not receive any of such income, except as he acted as one of the trustees.

Douglas Smith filed an income tax return for 1924 in which he did not include the income of the five trusts in question. He was required, however, to make an amended return in which such income was included; and, as is admitted by the pleadings, paid involuntarily and under protest and duress $59,898.51 more as taxes for 1924 than he would have paid if the income of the trusts had not been included as a part of his own income.

A claim for refund was rejected by the Commissioner of Internal Revenue. Appellees thereupon brought this suit, which resulted in a judgment for the amount of the claim.

WILKERSON, *District Judge:*

In support of the judgment it is urged:

1. Under a proper construction of section 219 (g) of the revenue act of 1924, the term "beneficiary" is broad enough to include a trustee.

2. As to trusts created both before and after the passage of the act, the section contravenes the fifth amendment unless the term "beneficiary" is construed to cover any interest adverse to that of the grantor.

3. As to trusts created before the passage of the act the section violates the fifth amendment when applied to impose a tax on the grantor by reason of property and its income disposed of by him prior to any imposition of such tax and when no similar tax existed.

As we are of the opinion that the third point must be ruled in favor of the taxpayer in this case, it is not necessary to consider the first two points. In 1922, when the trusts here in question were established, the grantor was not taxable on the income of trusts in which the power of revocation was reserved. The power to
7 revoke the trusts in question could not be exercised by the grantor alone. The consent of the trustee was essential to revocation. The grantor had parted with all interest in and control over the income of the trusts. And, in fact, the income here in question was distributed among the beneficiaries in accordance with the terms of the trusts. To be sure the trustee in October, 1922, assented to a modification of the trusts. We may not conjecture from that, however, that the trustee would have consented to a revocation of the trusts prior to that time, if it had been requested by the grantor to do so.

The power of Congress as to the taxation of the income of trusts which are under the unfettered control of the grantor or which may be created in the future is broad. (*Corliss* v. *Bowers*, 281 U. S. 376; *Milliken et al.* v. *United States*, 283 U. S. 15, 51; *Taft* v. *Bowers*, 278 U. S. 470; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264; *Lambert* v. *Yellowley*, 272 U. S. 581.) All measures reasonably necessary to prevent escape from taxes or surtaxes may be adopted.

When an attempt is made to apply those measures to past lawful transactions by which the grantor has parted with control over the trust fund and has made it impossible to regain such control by his own act, a different question arises. Under the broadest conception of legislative power, that which is not the income of the taxpayer and which it is impossible for him to make a part of his income may not be required arbitrarily to be included in his income. Such an attempt amounts to confiscation and offends the fifth amendment. (*Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Heiner* v. *Donnan*, 285 U. S. 312, 326, 327.)

The judgment is affirmed.

8 And on the same day, to wit, on the seventh of October, 1932 the following further proceedings were had and entered of record, to wit: Friday, October 7, 1932, court met pursuant to adjournment and was opened by proclamation.

Present: Hon. Samuel Alschuler, circuit judge, presiding; Hon. Evan A. Evans, circuit judge; Hon. William M. Sparks, circuit judge; Frederick G. Campbell, clerk; Henry C. W. Laubenheimer, marshal.

Before Hon. SAMUEL ALSCHULER, *Circuit Judge*, Hon. WILLIAM M. SPARKS, *Circuit Judge*, Hon. JAMES H. WILKERSON, *District Judge*

4692

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, APPELLANT *vs.* KENNETH G. SMITH AND FOREMAN STATE TRUST & SAVINGS BANK, EXECUTORS OF THE WILL OF DOUGLAS SMITH, APPELLEES	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed.

9 United States Circuit Court of Appeals for the Seventh Circuit

I, Frederick G. Campbell, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 8, inclusive, contain a true copy of the proceedings had and papers filed (excepting the briefs of counsel, and motions, stipulations, and

orders relating to the filing of briefs) in the case of Mabel G. Reinecke, formerly Collector of Internal Revenue for the First District of Illinois, appellant, vs. Kenneth G. Smith and Foreman State Trust and Savings Bank, executors of the will of Douglas Smith, appellees, No. 4692, October term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this 4th day of January, A. D. 1933.

[SEAL.] FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals
for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

Order allowing certiorari

Filed February 13, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. ——

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, petitioner

v.

KENNETH G. SMITH, AND FOREMAN-STATE TRUST AND SAVINGS BANK, Executors of the Will of Douglas Smith

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of Mabel G. Reinecke, formerly Collector of Internal Revenue for the First District of Illinois, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above cause on October 7, 1932.

OPINION BELOW

The United States District Court for the Northern District of Illinois filed no opinion. The opinion of the Circuit Court of Appeals is reported in 61 F. (2d) 324.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 7, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The sole question presented is the constitutionality of Section 219 (g) of the Revenue Act of 1924, which, as applied to this case, taxes the income of trusts created in 1922 to the grantor, if during the taxable year he has the power in conjunction with a trustee to modify or revoke the trust.

STATUTE INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 275:

> SEC. 219. (g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor. (U. S. C., Title 26, Sec. 960.)

STATEMENT

The facts admitted by the demurrer (R. 83) may be summarized as follows:

In 1922 five trusts were created by Douglas Smith, the taxpayer, for the benefit of his wife and

children. The trustees consisted of the taxpayer, his son, and a corporate banking company. The son was also a beneficiary; the third trustee was not. (R. 3–4.) Each trust provided as follows (R. 56, 61, 66, 71, 78):

> Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith, and either one of the other two trustees or their successors.

On October 22, 1924, each of the trusts was modified by striking out the above-quoted language, and thereafter Douglas Smith had no power to modify the trusts. (R. 8.)

Upon the authority of Section 219 (g) of the Revenue Act of 1924, the Commissioner of Internal Revenue required Douglas Smith to report the income of all of these trusts from January 1, 1924, to October 22, 1924, which resulted in a tax of $59,896.51. (R. 8–9.) After payment this suit was instituted to recover the tax. A demurrer to the declaration was overruled (R. 83), and judgment entered for the plaintiffs (respondents here) (R. 84). On appeal, the Circuit Court of Appeals for the Seventh Circuit affirmed the judgment and held the statute unconstitutional.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that Section 219 (g) of the Revenue Act of 1924

contravenes the Constitution when applied to a trust created in 1922, under which the grantor had the power in conjunction with a trustee to modify or revoke the trust.

REASONS FOR GRANTING THE WRIT

The court below has held that Section 219 (g)[1] of the Revenue Act of 1924 is unconstitutional when applied to the facts of this case. The statute in terms applies, and no question of statutory construction is presented. As applied to a case where the grantor had the unrestricted power of revocation at his own option, this Court has held the same section to be within the competency of Congress. *Corliss* v. *Bowers*, 281 U. S. 376. The trust in that case, like the trusts here involved, was created in 1922, and the objection made on the ground of retroactivity was ignored.

It is clear from the legislative history that the statute was enacted to correct an existing evil. See House Report No. 179 on the Revenue Bill of 1924, page 21; Senate Report No. 398 on the Revenue Bill of 1924, page 25, 68th Congress, 1st Session. Consequently it may be assumed that the statute affects numerous cases. The facts in particular cases will of course vary, but this decision declaring the statute unconstitutional in its application to trusts created prior to its enactment will have

[1] The tax is also authorized by Section 219 (h), Revenue Act of 1924, because of the reserved power to modify the trusts.

application in many cases. Provisions similar to Section 219 (g) of the 1924 Act are found in the subsequent Revenue Acts. Section 219 (g) of the Revenue Act of 1926 and Section 166 of the Revenue Acts of 1928 and 1932.

At least one other case is now pending which on its facts presents a closely analogous situation. In *Joseph H. Bromley, Jr., et al.* v. *Commissioner,* 26 B. T. A. 878, pending in the Circuit Court of Appeals for the Third Circuit, each of four brothers created a trust in 1921 for the benefit of his children. The four brothers were trustees of each trust and each trust could be revoked with the consent of all of the trustees. The Board of Tax Appeals held that the income of each trust was taxable to the grantor under Section 219 (g) of the Revenue Acts of 1924 and 1926, and Section 166 of the Revenue Act of 1928, and that thus applied, the statutes were valid.

It is clear that the grantor in the instant case retained some measure of control over the trust corpus. The question whether control must rest with the grantor alone or may be shared with another who is not a beneficiary of the trust in order that the income of the trust may be attributed to the grantor and taxed as his is not settled by any decision of this Court. A somewhat analogous question is now pending before this Court in *Esther Jackson Porter, Executrix, et al.* v. *Commissioner of Internal Revenue,* No. 466, October Term, 1932.

A prompt settlement of the constitutional question is desirable in the public interest. The question is thought worthy of review in this Court, because of its general importance, involving as it does the constitutionality of a Federal statute.

Wherefore, it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.

JANUARY, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 601

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, petitioner

v.

KENNETH G. SMITH AND FOREMAN-STATE TRUST AND SAVINGS BANK, Executors of the Will of Douglas Smith

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The District Court filed no opinion. The opinion of the Circuit Court of Appeals (R. 95–97) is reported in 61 F. (2d) 324.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 7, 1932. (R. 97.) The petition for certiorari was filed January 7, 1933, and was granted February 13, 1933. (R. 99.) The

jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION INVOLVED

Whether Section 219 (g) of the Revenue Act of 1924, which taxes the income of a trust to the grantor if during the taxable year he has the power, in conjunction with any person not a beneficiary, to revoke the trust, is constitutional as applied to trusts in which the grantor reserved the power to revoke with the consent of a trustee.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 28–29.

STATEMENT

This action was brought in the United States District Court for the Northern District of Illinois to recover income taxes asserted to have been exacted unlawfully of the respondents' testate, Douglas Smith, by the petitioner while Collector of Internal Revenue. The petitioner demurred to the complaint on the ground that the facts alleged did not constitute a cause of action. (R. 83.) The demurrer was overruled (R. 83) and upon the petitioner's refusal to plead over judgment was entered for the respondents (R. 84).

The complaint (R. 2–80) alleged that in 1922 the decedent created five trusts, one each for the benefit of his wife and three children and the fifth for the

joint benefit of all of them. The trustees were the same in all cases and consisted of the settlor, a trust company, and the decedent's son, who, in addition to being the immediate beneficiary in the trust set up for him, was a contingent beneficiary under the other trusts. Neither the settlor nor the trust company was a beneficiary under any of them.

Each trust instrument contained the following provision (R. 56, 61, 66, 71, 78):

> Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith, and either one of the other two trustees or their successors.

Pursuant to this power each of the individual trusts was modified at least once, and in the case of the wife's trust by the insertion of a provision that the trust fund should be in lieu of the wife's dower and statutory interests in the grantor's estate. (R. 59, 64, 69, 74.) On October 22, 1924, the grantor resigned as trustee, and at that time all the trust instruments were again amended by the elimination of the power to modify or revoke. (R. 8.)

The settlor did not include any of the income of the five trusts in his income tax return for 1924. He was required by the petitioner, however, pursuant to the provisions of Section 219 (g) of the Revenue Act of 1924 (*infra*, p. 28), to file an amended return including such income up to October 22,

1924, and to pay a tax computed upon the aggregate income so returned. The settlor then filed a claim for refund of the additional tax paid by reason of the inclusion of the trust income in his return and upon its rejection brought this suit. (R. 9–11.)

Upon appeal to the Circuit Court of Appeals the judgment for the respondents was affirmed on the ground that as applied to the facts of this case Section 219 (g) was unconstitutional under the due process clause of the Fifth Amendment.

SPECIFICATION OF ERROR

The Circuit Court of Appeals erred in holding that Section 219 (g) of the Revenue Act of 1924 contravenes the Constitution when applied to a trust created in 1922, under which the grantor had the power in conjunction with a trustee to modify or revoke the trust.

SUMMARY OF ARGUMENT

I

The case falls within the terms of Section 219 (g) of the Revenue Act of 1924 (*infra*, p. 28). That section provides that the income of a trust shall be taxable to the settlor when he has the power to revoke the trust, either alone or in conjunction with any person not a beneficiary of the trust. In this case the trust could be terminated by the settlor and the corporate trustee acting jointly. The corporate trustee was not a beneficiary of the trust within the meaning of the statute.

II

Although the decedent's interest in the property was qualified, it was nevertheless substantial, and he was not a stranger to the title. His rights and interests were elements in the totality of rights and interests which made up complete ownership, and his retention of this interest was a sufficient basis for the imposition of the tax. *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace,* No. 176, October Term, 1932, decided February 6, 1933; *Bromley* v. *McCaughn,* 280 U. S. 124, 136–138.

The fact that the right to revoke could be exercised only with the concurrence of a trustee does not distinguish this case from *Corliss* v. *Bowers,* 281 U. S. 376. *Saltonstall* v. *Saltonstall,* 276 U. S. 260, where the situation was precisely the same as that at bar, makes that clear. The power of revocation was subject to no fiduciary limitations, express or implied. When exercised with the consent of the trustee, who had no interest adverse to the settlor and was no doubt selected to do his will, it was as absolute as the power in *Corliss* v. *Bowers.*

Whether the settlor retains sufficient command of income to warrant his being taxed would seem to be less a problem of technicalities than of actualities. Where a settlor retains command over property, it is not unreasonable to suppose that nothing has been done in sharing such command which will defeat the settlor's purpose to exercise command.

The principle which should control decision in this case has been applied by this Court in cases involving estate and inheritance taxes. *Saltonstall* v. *Saltonstall*, 276 U. S. 260; *Tyler* v. *United States*, 281 U. S. 497. If, as these cases seem to show, it would have been neither arbitrary nor capricious for Congress to have included the corpus of the trusts in question in the grantor's estate had he died prior to October 22, 1924, it would seem equally clear that it is neither arbitrary nor capricious for Congress to impose upon the grantor during his life a tax based upon the income of these trusts.

A person may not escape liability for tax upon income by assigning it to another, unless he irrevocably and unqualifiedly gives him as well the property which produces it. The same result should be applied to a disposition of income through the device of a trust.

This case is not like *Hoeper* v. *Tax Commission*, 284 U. S. 206. There is no attempt here to tax one person for income derived by another from his own separate property. Here the beneficiaries had no power to pledge, sell, or bequeath the property. Only the grantor and one of the two trustees had power to exercise all the incidents of absolute ownership of the property. It lay in their power to control and dispose of the corpus without even consulting the beneficiaries.

III

The court below decided that the statute was unconstitutional when applied to the trusts involved in this case, since they were created in 1922 before the enactment of the Revenue Act of 1924. We submit that this position is without merit.

Cases like *Nichols* v. *Coolidge,* 274 U. S. 531, and *Untermyer* v. *Anderson,* 276 U. S. 440, turned upon the power of Congress to tax transfers or gifts made and completed before the laws assuming to tax them were enacted. Here the United States is not taxing the creation of the trusts or the transfer of the securities to the trustees, but the income received from the shares of stock after the effective date of the Revenue Act of 1924. Certainly there is no retroactivity as to the income rising after June 2, 1924, the date the Revenue Act of 1924 was enacted. And as to the income arising in 1924 before June 2, 1924, the case seems indistinguishable from *Corliss* v. *Bowers,* 281 U. S. 376, where the trust in question, like the trusts here in issue, was created in 1922. The statute was sustained although the taxpayer contended that it was invalid on account of retroactivity.

ARGUMENT

Section 219 (g) of the Revenue Act of 1924 provides:

> Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a

> **beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.**

In the present case the decedent was the creator of the trusts. He, a trust company, and his son were the trustees of the trusts. He and either one of the other two trustees had the power at any time to modify or revoke the trusts. The decedent's son was the principal beneficiary of one of the trusts, and a contingent beneficiary of the others; the trust company was not a beneficiary of any of the trusts.

On October 22, 1924, the decedent resigned as trustee, and with the consent of the other trustees the power to modify or revoke was eliminated. Only the income accruing to the trusts in 1924 prior to October 22, 1924, is involved in this case.

We contend that Section 219 (g) makes this income taxable to the creator of the trusts, and that the statute when so applied is constitutional.

I

THE CASE FALLS WITHIN THE TERMS OF SECTION 219 (g) OF THE REVENUE ACT OF 1924

The respondents contended before the courts below (R. 96) that the term "beneficiary" in Section 219 (g) of the Revenue Act of 1924 (*infra*, p. 28) includes a trustee and that for this reason

the case is without the statute. Whether the District Court reached its conclusion upon the basis of this argument does not appear, since it rendered no opinion. In the Circuit Court of Appeals the point was passed, the court being of opinion that in any event application of the statute to the present trusts is in violation of the Constitution.

We believe this preliminary contention of the taxpayers plainly without merit. The statute is clear, and excludes from its scope only powers of revocation exercisable by a grantor acting jointly with one or more beneficiaries. A trustee, whatever his duties in respect of the trust property, is not by virtue of his office alone a beneficiary.[1] The beneficiary is the person for whom property is held; the trustee is the person who holds it. *Larkin* v. *Wikoff*, 75 N. J. Eq. 462, 474. Cf. *Smith* v. *Commisioner*, 23 B. T. A. 631, reversed, 59 F. (2d) 56 (C. C. A. 1st); *Title Guarantee Loan & Trust Co.* v. *Commissioner*, decided February 17, 1933 (C. C. A. 5th). This is the commonly understood meaning of the term beneficiary, and it is not to be assumed that Congress used the word in any other

[1] In the American Law Institute's Restatement of Trusts, Section 122, Comment *b*, the rule is stated as follows: "Although a trustee is entitled to compensation for acting as trustee (see Section —), he is not as such a beneficiary of the trust."

The respondents themselves state that "Douglas Smith, the grantor, was not a beneficiary under any of the trusts." (Br. in Opp. 3.) Yet he was a trustee with exactly the same rights and powers as the trust company.

than its ordinary acceptation. *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 560. That this was in fact the intention of Congress is made abundantly clear when Section 219 is read in its entirety, for "fiduciary" and "beneficiary" are used throughout the section as words of contrast.

This is the view which the Treasury Department has adopted in administering the statute. Article 347 of Regulations 65, promulgated under the Revenue Act of 1924, provides among other things that—

> The term "beneficiary" as used in this article includes any person entitled to an interest in the income or the principal of a trust, but does not include one having merely a nominal interest in the income or principal.

This interpretation has been consistently applied under the corresponding provisions of the later Revenue Acts.[2] Regulations 69, Article 347, promulgated under the Revenue Act of 1926; Regulations 74, Article 881, promulgated under the Revenue Act of 1928. Under these circumstances, as this Court has many times held, the executive in-

[2] Section 219 (g) of the Revenue Act of 1926, c. 27, 44 Stat. 32 (U. S. C. App., Title 26, Sec. 960); Section 166 of the Revenue Act of 1928, c. 852, 45 Stat. 840 (U. S. C. Sup. V, Title 26, Sec. 2166). The provision is worded somewhat differently in Section 166 of the Revenue Act of 1932, c. 209, 47 Stat. 221 (U. S. C. Sup. VI, Title 26, Sec. 166). See Article 881 of Regulations 77 under the 1932 Act.

terpretation must be regarded as expressing the intent of Congress. *Massachusetts Mutual Life Ins. Co.* v. *United States,* No. 322, October Term, 1932, decided February 6, 1933.

The grantor and the trustee bank jointly had the power to alter or terminate the five trusts. The case is clearly within the terms of Section 219 (g), and no question of statutory construction is involved.

II

TO TAX TO THE SETTLOR THE INCOME OF THE TRUSTS IN QUESTION IS NOT AN UNREASONABLE EXERCISE OF THE TAXING POWER

The Fifth Amendment, upon which the respondents here rely, does not provide a rigid rule delimiting the power of Congress. It requires only that exercise of the taxing power must not be arbitrary or capricious—must not pass beyond the "admonitions of fair dealing." *Tyler* v. *United States,* 281 U. S. 497, 504; *Moyer* v. *Peabody,* 212 U. S. 78, 84; *Cohan* v. *Commissioner,* 39 F. (2d) 540, 545 (C. C. A. 2d). That, we believe, the tax in this case does not do.

It is plain that the decedent retained a substantial interest in the trust property. True, this interest was hedged in by the requirement that it could be enjoyed only with the consent of one of the two other trustees, but nevertheless the decedent's interest was far different from that of a stranger to the title and constituted a substantial interest in the trust property. This interest, though quali-

fied, was one of the totality of rights and interests which constituted complete ownership of the property. The propriety of the tax would therefore seem to be established by this Court's recent declaration that "The power to tax property * * * necessarily includes the power to tax its constituent elements." *Nashville, Chattanooga & St. Louis Railway* v. *Wallace*, No. 176, October Term, 1932, decided February 6, 1933. See also *Bromley* v. *McCaughn*, 280 U. S. 124, 136–138.

In *Corliss* v. *Bowers*, 281 U. S. 376, this Court held that it is not beyond the power of Congress to tax a person upon income given another through the device of a trust where the donor does not give the donee as well the property which produces that income but retains to himself alone the right to revest title to the property. The fact that the right to revoke here could be exercised only with the concurrence of another whom the settlor had chosen to act with him does not, we submit, serve as a sufficient basis to distinguish this case from *Corliss* v. *Bowers*. *Saltonstall* v. *Saltonstall*, 276 U. S. 260 (see p. 17, *infra*), where the situation was precisely the same as that at bar, makes that clear. Nor does it bring the case within the decision as to the "five trusts" involved in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, since one of the trustees was not a beneficiary. Although a trustee owes fiduciary duties to the beneficiaries with respect to the administration of the trust and the preservation of the trust property, he obviously has no such

obligation with respect to such a power as that involved in this case. To imply a fiduciary limitation upon a power to revoke the trust would annihilate the power, because revocation terminates the trust and the interest of the beneficiary. The trustee, it is true, is under no legal duty to join with the settlor in revoking the trust, but having derived his power of revocation under the trust instrument executed by the settlor for the accomplishment of the settlor's purposes in disposing of his own property the trustee will quite properly be influenced by the wishes of the settlor in exercising with him an absolute power of revocation. Under these circumstances the exercise of a power to revoke does not cut off interests already vested, but is merely the exercise of a right to which those interests were always subject. The reserved right of revocation is superior to every right of the beneficiary and when exercised by the grantor with the trustee's consent restores to the settlor the full enjoyment of his property terminating all interest of the beneficiary therein.

We do not believe that in deciding *Corliss* v. *Bowers, supra,* this Court meant to lay down a rule that Congress could tax trust income to the settlor only if he had the unqualified power to appropriate the income to his own benefit and not otherwise. Such a holding would seem from a practical standpoint to be inconsistent with the decisions in *Lucas* v. *Earl,* 281 U. S. 111, and *Burnet* v. *Leininger,* 285 U. S. 136, where it was held that

an assignor was taxable upon income he had no right to use for his own purposes. In any event, whether a grantor has sufficient "unfettered command" of income, of which this Court spoke in the *Corliss case* (p. 378), to warrant his being taxed upon the income, would seem logically to be less a problem of technicalities than of actualities. Congress was justified in assuming that a power of revocation inserted in a trust instrument was inserted for a real purpose, and that the purpose was the same whether the power could be exercised by the grantor alone or by him and another whom he has chosen to act with him. Where a settlor thus makes clear his intention to retain command it may reasonably be assumed that nothing will be done in sharing command which will defeat the settlor's purpose to revoke the trust whenever he wishes. Certainly it can hardly be thought that the grantor, in selecting the person who is to share with him "unfettered command" will choose one who may not be trusted to carry out his wishes. The statute should not be tested by inquiring in each case whether amenability exists, as was suggested in *Commissioner* v. *McCormick,* 43 F. (2d) 277, 279 (C. C. A. 7th), reversed, 283 U. S. 784. But if the Constitution prevents Congress from adopting the reasonable view that the grantor has retained practical control in all situations where the consent of a person holding an adverse interest is not required, then the taxing power may be circumvented by the simple expedient of introducing

a straw man, who, in the eyes of the law, assumes a substance he does not possess. The Constitution does not require Congress to close its eyes to things which are obvious to everyone else in this practical world. The grantor in this case might have limited exercise of the power of revocation by requiring consent of one or more of his children, but they were all beneficiaries and had their own interests to consider. He did not do so. Instead he chose another, one in whose corporate judgment he presumably had confidence. That this trustee could be expected to respect the grantor's wishes is demonstrated, were demonstration necessary, by the fact that the wife's trust was subsequently modified with this trustee's consent to her definite financial loss. (R. 59.) We submit that it is not capricious to assume that a settlor who avoids an adverse interest in choosing a party to share his power has selected a friendly one. The two jointly command for the benefit of the one, and it seems not unreasonable that Congress should provide that that one should bear the burden. The same conclusion should be reached here that was reached in *Corliss* v. *Bowers, supra.*

This result is also supported by several of this Court's decisions with respect to taxes upon estates and inheritances and upon gifts. Had the grantor in this case died while the Revenue Act of 1924 was in force and before October 22, 1924, the date when the power of revocation was canceled, the value of the trust property would have been taxable as a

part of his gross estate under Section 302 (d) of the Revenue Act of 1924, and this tax, we submit, would have been constitutional.

In *Wells* v. *Commissioner,* decided February 4, 1933 (C. C. A. 8th), the court said:

> The relation that must exist between the taxpayer and the income for which he is taxable should be no different than the relation which must exist between a decedent and the property by which a transfer or succession tax is to be measured * * *. If the trust property may not be made a part of petitioner's estate at death it is difficult to understand how the income therefrom may be part of his income during life.

Conversely, if the corpus of a trust may be included in the settlor's estate at death, taxation of the income to him during life can not be said to be an abuse of the taxing power. This Court said in *Burnet* v. *Guggenheim,* No. 283, October Term, 1932, decided February 6, 1933, that—

> If * * * a power to revoke does not postpone for the purpose of taxation the consummation of the gift, then the income of these trusts is exempt from the tax as fully as the principal. What passed to the beneficiaries was the same in either case, an interest inchoate and contingent till rendered absolute and consummate through receipt or accrual before the act of revocation.

In *Saltonstall* v. *Saltonstall,* 276 U. S. 260, the grantor of a trust had the power, acting jointly

with a trustee, to alter or revoke the trust. This Court held that it was not a violation of the Fourteenth Amendment for a State to impose a tax on the succession to the corpus at the occasion of the grantor's death. We believe it unimportant that the tax there involved was a succession tax and not a transfer tax. Transfer and succession are but counterparts—two facets of the same die. If succession is not complete until death, there is no completed transfer before that time, and if the transfer is complete the succession of necessity must be complete. Cf. *Porter* v. *Commissioner,* 60 F. (2d) 673 (C. C. A. 2d), No. 466, October Term, 1932. The decision in the *Saltonstall case,* we believe, is a direct and conclusive authority in support of our position here.

Another decision tending to show that the trust property in this case could validly have been included in the settlor's gross estate is *Tyler* v. *United States,* 281 U. S. 497, where this Court upheld a transfer tax at the death of a tenant by the entirety measured by the value of the whole tenancy. There, as here, the decedent could not alone dispose of the property during his life; such action required the concurrence of another, and in the *Tyler case* that other had a substantial adverse interest. Here the one whose concurrence was required had no adverse beneficial interest. The decedent's power of disposition in this case was therefore at least as great as that of the tenant in the

Tyler case. See also *Chase National Bank* v. *United States,* 278 U. S. 327; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Philips* v. *Dime Safe D. & T. Co.,* 284 U. S. 160; *Gwinn* v. *Burnet,* 287 U. S. ——, decided December 5, 1932; *Third National Bank & Trust Co.* v. *White,* 287 U. S. ——, decided December 19, 1932.

If, as these cases seem to show, it would have been neither arbitrary nor capricious for Congress to have included the corpus of the trusts in question in the grantor's estate had he died prior to October 22, 1924, it would seem equally clear that it is neither arbitrary nor capricious for Congress to impose upon the grantor during his life a tax based upon the income of those trusts. Anything to the contrary in cases like *Farmers' Loan & Trust Co.* v. *Bowers,* 29 F. (2d) 14 (C. C. A. 2d), *White* v. *Erskine,* 47 F. (2d) 1014 (C. C. A. 1st), or *Stewart* v. *Commissioner,* B. T. A., decided January 31, 1933, must, so far as applicable to the present situation, be regarded as not authoritative, in the light of this Court's decisions in the *Saltonstall* and *Tyler cases.*

There are other considerations which we believe give further support to the view that the tax in question is not an abuse of power on the part of Congress. It is well settled that a person may not escape liability for tax upon income by assigning it to another, even if the assignment is in terms in advance of production of the income, unless he ir-

revocably and unqualifiedly gives him as well the property which produces it. *Burnet* v. *Leininger,* 285 U. S. 136; *Lucas* v. *Earl,* 281 U. S. 111; *Bing* v. *Bowers,* 26 F. (2d) 1017 (C. C. A. 2d), affirming 22 F. (2d) 450 (S. D. N. Y.); *Mitchel* v. *Bowers,* 15 F. (2d) 287 (C. C. A. 2d), certiorari denied, 273 U. S. 759; *Nelson* v. *Ferguson,* 56 F. (2d) 121, 124 (C. C. A. 3d), certiorari denied, 286 U. S. 565; *Parker* v. *Routzahn,* 56 F. (2d) 730 (C. C. A. 6th); *Dickey* v. *Burnet,* 56 F. (2d) 917, 920 (C. C. A. 8th), certiorari denied October 10, 1932; *Van Meter* v. *Commissioner,* 61 F. (2d) 817, 818–819 (C. C. A. 8th); *Ward* v. *Commissioner,* 58 F. (2d) 757 (C. C. A. 9th); *Leydig* v. *Commissioner,* 43 F. (2d) 494, 496 (C. C. A. 10th); *Porter* v. *United States,* 52 F. (2d) 1056, 1057 (C. Cls.). As said in the *Parker case, supra* (p. 733), for an assignor to rid himself of liability for income tax he must make "an irrevocable assignment, not merely of future income but of the property from which such income afterwards arises." If this is true in case of an assignment, it is obvious that from a practical standpoint there is no good reason why a different requirement should apply to a trust arrangement. Unless the donor gives him the property too, the donee in substance gets no more in the one case than in the other. In the last analysis the gift is only of the income in either situation.

One of the specific reasons which moved Congress to enact Section 219 (g) was the elimination

of this manifest unfairness. The Senate Committee on Finance said in respect of the statute (Senate Report No. 398, 68th Cong., 1st Sess., p. 25):

> The creation of a revocable trust constitutes nothing but an assignment of the right to receive future income. Since such an assignment does not operate to increase[3] the taxable income of the assignor, the creation of a revocable trust should not so operate, but the income of such a trust should be included in the income of the grantor. The bill so provides.

Congress thought that it was only fair that one who gives to another, through a trust arrangement, the income of property which he has the power either then or later to repossess, acting either alone or in conjunction with another whom he has chosen to share his power with him, should be taxed upon that income just as a person is taxed upon income he gives to another by means of an assignment, either for a definite period or for so long as the assignor may be so inclined. It intended by Section 219 (g) to establish that policy and that, we submit, should be sufficient to sustain the petitioner's position.

It is no answer to say that in situations like that in the *Leininger case* the donor accomplishes his purpose by retaining legal title to the corpus which produces the income, for here the settlor was one

[3] The word "increase" is manifestly an error for "decrease."

of the trustees and shared the legal title. Obviously, the donor has no greater beneficial rights in the income when he retains the legal title than when, for reasons of his own, he makes trustees the channel of title. In essence there is no difference. For practical purposes the donee gets no more in the one situation than in the other, and taxation, it has many times been said by this Court, is a practical matter, attaching little importance to the technical refinements of title which a taxpayer may employ to reach his ends. *Tyler* v. *United States, supra,* p. 503; *Burnet* v. *Guggenheim,* No. 283, October Term, 1932, decided February 6, 1933. In cases of this kind it cares less for the vehicle a donor may use to serve his purpose than for what he accomplishes by its use. It was said in *Weiss* v. *Stearn,* 265 U. S. 242, 254, that "when applying the provisions of the Sixteenth Amendment and income laws enacted thereunder we must regard matters of substance and not mere form." Putting aside the form, it is obvious that the beneficiaries in the case at bar got no more than the assignee in the *Leininger case;* both got income and income alone, and if it is reasonable to tax the donor of the income in the one situation, it should be reasonable to do so in the other.

Unlike *Hoeper* v. *Tax Commission,* 284 U. S. 206, upon which the respondents relied below, the present case is not one where one person is taxed for income derived by another from his own separate

property. In the *Hoeper case* the income which the State sought to tax to the husband was earned by the wife's own efforts or was the fruit of property which she owned in her own right and with which neither her husband nor anyone else had any connection and over which he could exercise no rights. Quite different is the situation here. In this case the beneficiaries had no power to pledge, sell, or bequeath the property. The grantor and one of the two trustees had all the rights and powers incident to absolute ownership of the property. Between them they had what was the equivalent of a fee. *Bullen* v. *Wisconsin*, 240 U. S. 625, 631. It lay in their power to control or dispose of the corpus without consulting the beneficiaries. The latter were not, like the wife in the *Hoeper case*, the owners of the property which produced the income. Cf. *Burnet* v. *Guggenheim, supra; Porter* v. *Commissioner*, 60 F. (2d) 673 (C. C. A. 2d), now pending before this Court on certiorari, No. 466, October Term, 1932.

Congress had in mind still another purpose in enacting Section 219 (g). That purpose was "to secure clarity and to prevent the evasion of taxes by means of estates and trusts."[4] House Report No.

[4] So far as they have spoken on the point, the courts have said that Section 219 (g) did not operate to change the law but was merely declaratory. *McCauley* v. *Commissioner*, 44 F. (2d) 919, 920 (C. C. A. 5th); *Dickey* v. *Burnet*, 56 F. (2d) 917, 920 (C. C. A. 8th), certiorari denied October 10, 1932, *supra*. The statement of the committees that the purpose of this section was "to secure clarity" supports this view.

179, 68th Cong., 1st Sess., p. 21; Senate Report No. 398, *supra*, p. 25; *Corliss* v. *Bowers*, 34 F. (2d) 656, 657–658 (C. C. A. 2d), affirmed, 281 U. S. 376. The statute was designed to correct an existing evil. This fact was deemed important in the *Tyler case, supra*. It is no less so here. In this case in respect of income taxes, as in that case in respect of estate taxes (p. 505), "the evident and legitimate aim of Congress was to prevent an avoidance"; and here as there, "the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end. *Taft* v. *Bowers*, 278 U. S. 470, 482."[5]

The facts in *Bromley* v. *Commissioner*, 26 B. T. A. 878, now pending in the Circuit Court of Appeals for the Third Circuit, present a situation closely analogous to that here involved. Each of four brothers created a trust in 1921 for the bene-

[5] Unless the income involved in this case is taxed to the settlor, it seems very likely that so much of it as was distributable to the beneficiaries will go untaxed. Each installment of income from a revocable trust is a gift to the beneficiary. I. T. 2145, IV–1, Cumulative Bulletin 43; Regulations 67, Art. 1; see *Burnet* v. *Guggenheim*, *supra*. The amounts received by the beneficiaries would not be taxable as income to them, for gifts are not subject to the income tax. See Section 213 (b) (3) of the Revenue Act of 1924. The income which was distributable to the beneficiaries would not be taxable to the trustee. Section 219 (b) (2) of the Revenue Act of 1924.

fit of his children. The four brothers were trustees of each trust and each trust could be revoked only with the consent of all the trustees. The Board of Tax Appeals held that the income of each trust was taxable to the grantor under Section 219 (g) and that the statute was not invalid. It said (p. 880):

> The purpose of the statute here involved, as disclosed by reports of Congressional Committees, is to prevent evasion of tax by means of trusts. * * * To effect this end, Congress enacted that where the creator of a trust reserves the right of revesting the property in himself—acting either alone or in conjunction with anyone not a beneficiary—the income shall be considered to be his income. We see nothing unreasonable in this when its purpose is considered. "If the taxation involves reasonableness to meet the desired ends of fair play, it is valid." *Corliss* v. *Bowers,* 34 F. (2d) 656.

III

THE STATUTE DOES NOT HAVE AN INVALID RETROACTIVE OPERATION

The respondents urged below (Br. 26–28), and it was upon this point that the Circuit Court of Appeals decided the case (R. 96), that since the trusts in question were created before the enactment of Section 219 (g), enforcement of the stat-

ute would be contrary to the Fifth Amendment, because of what is said to be its retroactive operation. We submit that this position is without merit.

In support of their contention the respondents relied upon decisions dealing with the constitutional limitations upon the authority of Congress to impose death duties and gift taxes. The distinction between those situations and the one here in question would seem to be obvious. Cases like *Nichols* v. *Coolidge,* 274 U. S. 531, *Untermyer* v. *Anderson,* 276 U. S. 440, and *Blodgett* v. *Holden,* 275 U. S. 142, turn upon the power of Congress to tax transfers or gifts made and completed before the laws assuming to tax them were enacted. Such impositions this Court held were arbitrary and invalid. But here there is no attempt to tax the creation of the trusts or the transfer of the securities to the trustees, but only the income received from the trust property. That income arose after January 1, 1924, the effective date of the law (Section 283 of the Revenue Act of 1924 (*infra,* p. 28)), and although the Revenue Act of 1924 was not enacted until June 2, 1924, such limited retroactivity is common in income tax laws and has uniformly been sustained as lawful. See *United States* v. *Cooper,* 280 U. S. 409, 411. Cf. Revenue Act of 1918, enacted on February 24, 1919, but applicable to 1918 income; *Fawcus Machine Co.* v. *United*

States, 282 U. S. 375, 379. Certainly there is no retroactivity as to the income arising after June 2, 1924, the date the Revenue Act of 1924 was enacted. And as to the income arising in 1924 before June 2, 1924, the question seems indistinguishable from that in *Corliss* v. *Bowers,* 281 U. S. 376, where the trust involved, like the trusts here in issue, was created in 1922. That portion of the income had passed as completely beyond the settlor's control, when the Revenue Act of 1924 was enacted, in the *Corliss case* as in this. The statute was sustained, although the taxpayer contended that it was invalid on account of retroactivity.

A person has no vested right against taxation of future income. The Sixteenth Amendment did not give Congress the power to impose income taxes. That power already existed; the Amendment merely removed the requirement of apportionment. *Brushaber* v. *Union Pac. R. R. Co.,* 240 U. S. 1. Nevertheless, despite all the other constitutional provisions, it is clear that upon its adoption Congress could tax without apportionment "everything that became income, in the ordinary sense of the word, after the adoption of the Amendment" (*Lynch* v. *Hornby,* 247 U. S. 339, 343–344), whether the particular source came into being before or after that time. And so here Congress could tax the income arising after the effective date of Section 219 (g) though the trusts were created in 1922.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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MARCH, 1933.

APPENDIX

STATUTES INVOLVED

The Revenue Act of 1924, c. 234, 43 Stat. 253, 277, 303, 304, contained the following provisions:

SEC. 219. * * *

(g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

(h) Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him, or where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214), such part of the income of the trust shall be included in computing the net income of the grantor. (U. S. C., Title 26, Section 960.)

* * * * *

SEC. 283. This title shall take ffect as of January 1, 1924.

* * * * *

SEC. 302. * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth * * * (U. S. C., Title 26, Sec. 1094.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No. 601

MABEL G. REINECKE, formerly Collector of Internal Revenue for the First District of Illinois,

Petitioner,

vs.

KENNETH G. SMITH and FOREMAN-STATE TRUST AND SAVINGS BANK, Executors of the Will of Douglas Smith,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No. 601.

MABEL G. REINECKE, formerly Collector of Internal Revenue for the First District of Illinois,

Petitioner,

vs.

KENNETH G. SMITH and FOREMAN-STATE TRUST AND SAVINGS BANK, Executors of the Will of Douglas Smith,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinion Below.

The United States District Court for the Northern District of Illinois filed no opinion. The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 95) is reported in 61 F. (2) 324.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered October 7, 1932 (R. 97). The petition for a writ of certiorari was filed January 7, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

The question is whether, under Section 219 (g) of the Revenue Act of 1924, approved June 2, 1924, (a new provision), the grantor of trusts created in 1922 was taxable in 1924 on the income of the trusts which he did not receive, and could not have received unless the trusts had been revoked (and they were not) prior to the earning of the income, such revocation in each case being possible only if consented to by one of two trustees of the trusts, one of whom was a beneficiary and the other a public trust company.

The Statute Involved.

Section 219 (g) of the Revenue Act of 1924, approved June 2, 1924, provides as follows:

> "Sec. 219 (g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable years shall be included in computing the net income of the grantor." (U. S. C., Title 26, Sec. 960.)

Statement.

The facts are set out in the declaration and are admitted by demurrer (R. 83).

In 1922 Douglas Smith created five trusts for the benefit of his wife and children. The trustees of each trust from the date of its creation until October 22, 1924, were Douglas Smith, his son, Kenneth Smith, who was also a beneficiary under each trust, and Foreman Bros. Banking Company, a public trust company organized under the laws of the State of Illinois (R. 3, 4, 10). Douglas Smith, the grantor, was not a beneficiary under any of the trusts and had no right to receive or dispose of any of the principal or income and never directly or indirectly received any of the same (R. 7, 8, 9, 10).

In each trust instrument, it was provided that the trusts might be revoked by Douglas Smith with the written consent of either one of the other two trustees, being Kenneth Smith, who was also a beneficiary, and Foreman Bros. Banking Company, the public trust company. This provision, the same in each instrument, was as follows (R. 7):

> "Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors."

On October 22, 1924, Douglas Smith resigned as trustee from each trust and the above provision for the revocation or modification of the trusts was in each case eliminated (R. 8).

The only controversy between the parties to this suit is with respect to the income of the five trusts from January 1 to October 22, 1924, which Douglas Smith under compulsion included in his individual income tax return for 1924 and on account of which he paid Petitioner, under protest and duress, income taxes in the sum of $59,896.51 more than he would have otherwise been required to pay (R. 8, 9). Douglas Smith individually never received any of said income, neither to his own use nor for his benefit, directly or indirectly, and never exercised any control over the same (R. 7, 8, 9, 10). The income in question was in fact received by the trustees of the trusts and was distributed to the beneficiaries according to the trust indentures (R. 10).

At the time the trusts were created in 1922 the Bureau of Internal Revenue had ruled and was holding that income of trusts such as those here in question, even of trusts revocable by the grantor *alone*, was not taxable to the grantor. Section 219 (g) was new in the Revenue Act of 1924 which was approved June 2, 1924.

Argument.

It is respectfully suggested that this case is not one which warrants consideration by this Court. It is an isolated situation and pertains only to the income from January 1, 1924 to October 22, 1924, the provision in controversy having been eliminated from the trusts on the latter date.

We do not concur with Petitioner that the only question is one of the constitutionality of the section in question. There are questions of construction which would dispose of the case.

The trusts were created in 1922 long prior to the passage and approval, on June 2, 1924, of the 1924 Act. They could not be revoked by the grantor, alone. The consent of a third person, a trustee of the trusts, was required and the gifts passed as completely from the enjoyment and control of the grantor in 1922 as if the gifts had been absolute. *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 346, 347; *Farmers' Loan & Trust Company* v. *Bowers*, 29 F. (2) 14, (C. C. A., 2nd); *White* v. *Erskine*, 47 F. (2) 1014, (C. C. A., 1st); *Hill* v. *Nichols*, 18 F. (2) 139 (D. Ct., Mass.). See *Commissioner of Internal Revenue* v. *McCormick*, 43 F. (2) 277, 278, 279, (C. C. A., 7th), and *McCormick* v. *Burnet*, 283 U. S. 784, reversing same.

With respect to such trusts, Section 219 (g) must be construed as having only prospective application and to apply only to trusts created after the passage of the Act, in order to avoid the constitutional objection. *Blodgett* v. *Holden*, 275 U. S. 142, 148, 149; *Lewellyn* v. *Frick*, 268 U. S. 238, 251, 252.

By its terms Section 219 (g) does not apply even prospectively where the consent of a beneficiary is required for revocation. The exception is grounded on the fact that in such case the grantor has parted with his enjoyment and control. In legal contemplation, the required consent of a trustee, as the representatives of the beneficiaries, must be given the same status as a required consent of a beneficiary and for the same reason. Section 219 (g), properly construed, does not apply to trusts of either character. *White* v. *Erskine*, 47 F. (2) 1014, 1016, *supra*.

This court has already decided the constitutional question if Section 219 (g) be held by its terms to apply to the gifts made by Douglas Smith in 1922, prior to any imposition of such tax and when no similar tax existed. *Nichols* v. *Coolidge*, 274 U. S. 531, 542, 543; *Untermyer* v. *Anderson*, 276 U. S. 440. See also *Hill* v. *Nichols*, 18 F. (2) 139, *supra*. The Circuit Court of Appeals simply followed those cases in its decision. The Court said (R. 97):

> "When an attempt is made to apply those measures to past lawful transactions by which the grantor has parted with control over the trust fund and has made it impossible to regain such control by his own act, a different question arises. Under the broadest conception of legislative power, that which is not the income of the taxpayer and which it is impossible for him to make a part of his income may not be required arbitrarily to be included in his income. Such an attempt amounts to confiscation and offends the fifth amendment."

When the trusts here in question were created in 1922, the Bureau had ruled and was holding that even the income

of trusts revocable by the grantor, *alone,* was not taxable to the grantor (*Law Opinion* 1102, *C. B.* 1-2, p. 50).

To refuse to construe Section 219 (g) as excepting from its operation trusts revocable with the consent of a trustee for the beneficiaries, notwithstanding that it excepts from its operation trusts revocable with the consent of beneficiary, would require that that section be held unconstitutional as applied to such trusts, even as to those created after the passage of the Act. That which is in fact not the taxpayer's income or property and which it is beyond his power to take to himself can not be made such by calling it his and any attempt to measure the tax on his income or property by the property or income of another is not taxation but spoilation, and violates the due process guaranteed by the Fifth Amendment. No supposed necessity of getting the Government more taxes can justify the otherwise unconstitutional exaction. *Heiner* v. *Donnan,* 285 U. S. 312, 326; *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, 215.

It is clear that both as a matter of construction and on the constitutional ground the decision in this case is in strict accord with all the decided cases of this and the other Federal Courts. Respondents know of no court decision involving similar facts that is contrary, and Petitioner mentions none. The decision in this case in no way conflicts with the decision of this Court in *Corliss* v. *Bowers,* 281 U. S. 376. That case involved a trust in which the grantor had, by himself, the "unfettered" power to revoke at any time and the decision was put squarely on that ground, the court saying (p. 378):

> "The income that is subject to a man's *unfettered* command and that he is free to enjoy at his *own option* may be taxed to him as his own income, whether he sees fit to enjoy it or not." (Italics supplied.)

When a man at will may reach out his hand and take to himself property and the income thereof, the property and income are, for all practical purposes, as much his as if he had retained them in his immediate possession. To tax a man upon the income of such property for any taxable year, even though for a year after the date of the creation of the trust, is giving the statute no retroactive operation. And such a tax is of course within the power of Congress to lay. But it is otherwise where, as in the case at bar, the gift passed out of the settlor's enjoyment and control upon the creation of the trusts long prior to the imposition of the tax.

The case of *Porter* v. *Commissioner*, No. 466, October Term, 1932, now pending before this Court and referred to by Petitioner, is in no wise analogous to the case at bar. That case involves the imposition of an estate tax or death duty where the grantor retained in himself, *alone*, the *unfettered* power to make whatever disposition of the property he desired, save, only, that he could not recall it to himself. It follows that one of the principal attributes of ownership remained in the settlor until the moment of his death, and, by a like token, at his death there ripened for the beneciaries an interest on which an excise on the right to receive property at death might be laid.

The termination at death of a power of appointment may be the subject of a death duty or succession tax. The case at bar concerns an income tax and one upon income which the person sought to be taxed did not receive and could not have received after it was earned. In order to have received the income, it would have been necessary for a trustee, who had a duty to protect the trust, to have in effect made a gift, in advance, of the

corpus of the trust to the person sought to be taxed. Alone, the grantor had no such power.

Everything said above with respect to Section 219 (g) applies with the same force to Section 219 (h) referred to by Petitioner in a footnote.

Petitioner states that a review of the question presented by this case is desirable in the public interest and because of its general importance. The judgment is correct for any one of the several enumerated reasons, and we do not believe that any public interest attaches to its review. As stated, it is not in conflict but in strict accord with the decisions of this Court and the lower Federal courts. It has a very limited effect, not only as between the parties but because it applies only to trusts revocable with the consent of a trustee. Respondents have been unable to find more than four such cases, and of these, only two have arisen under the Revenue Act of 1924 and subsequent Acts, with reference to trusts created prior to 1924. See *Farmers' Loan & Trust Company* v. *Bowers*, 29 F. (2) 14, *supra*; *White* v. *Erskine*, 47 F. (2) 1014, *supra*; *Hill* v. *Nichols*, 18 F. (2) 139, *supra*; *Joseph H. Bromley, Jr., et al.* v. *Commissioner*, 26 B. T. A. 878. The last cited case decided by the Board of Tax Appeals is the only case found by Respondents which does not support the judgment in the case at bar. A reading of the Board's opinion reveals that the problem involved was not fully comprehended and that the Board thought *Corliss* v. *Bowers* determinative of the question. The decision of the Board is now pending on review in the Circuit Court of Appeals for the Third Circuit.

Inasmuch as the decision in the case at bar applies only to trusts created prior to the 1924 Act and of necessity only to those where the grantor is living, it becomes of

less and less significance by the passage of time since the 1924 Act was passed.

Even under the Revenue Acts of 1924, 1926 and 1928, (the provisions of the Revenue Act of 1932, Section 166, are substantially different), the only decision which could be of any real importance would be with respect to a trust, revocable with the consent of a trustee, which was created *after* the passage of the 1924 Act.

Since the result in this case is obviously correct and in accord with the decided cases, and since the question is not so important as to require further review in the public interest and is of importance only as to the parties hereto and as to them, only for the period January 1st to October 22, 1924, it is respectfully submitted that the petition for a writ of certiorari directed to the Circuit Court of Appeals for the Seventh Circuit in this case should be denied.

Respectfully submitted,

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BRIEF FOR RESPONDENTS.

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The question is whether, under Section 219 (g) of the Revenue Act of 1924, approved June 2, 1924 (a new provision), the grantor of trusts created in 1922 was taxable

in 1924 on the income of the trusts which he did not receive and could not have received unless the trusts had been revoked (and they were not) prior to the earning of the income, such revocation in each case being possible only if consented to by one of two other trustees, one of whom was a beneficiary and the other a public banking and trust company.

In other words, may a person be subjected to a direct tax measured by the income of another?

In reaching a conclusion, two questions must be decided:

First: Does Section 219 (g) apply to trusts which can only be revoked with the written consent of a trustee?

Second: If Section 219 (g) does apply to such a trust, is it constitutional, particularly when applied to a trust created prior to its enactment and prior to the time that such a provision was in legislative contemplation?

Statement.

The facts are set out in the Declaration (R. 2-80) and are admitted by demurrer (R. 83).

In 1922, Douglas Smith created five trusts for the benefit of his wife and children. The trustees of each trust from the date of its creation until October 22, 1924, were Douglas Smith, Kenneth G. Smith, his son, who was also a beneficiary under each trust, and Foreman Bros. Banking Company, a public banking and trust company organized under the laws of the State of Illinois (subsequently, Foreman-State Trust and Savings Bank) (R. 3, 4, 10). Douglas Smith, the grantor, was not a beneficiary under any of the trusts and had no right to receive or dispose of any of the principal or income and never directly or indirectly received any of the same (R. 7, 8, 9, 10).

In each trust instrument, it was provided that the trusts might be revoked by Douglas Smith with the written consent of either one of the other two trustees, being Kenneth G. Smith, who was also a beneficiary, and Foreman Bros. Banking Company, a public banking and trust company. This provision, the same in each instrument, was as follows (R. 7):

> "Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors."

Douglas Smith alone had no power to revoke or modify any of said trusts (R. 10). The Declaration alleged (R. 10, par. 16 (erroneously printed 61)) that the Foreman-State Trust and Savings Bank was entitled to receive compensation from each of said five trusts, and "was a representative of and was acting for the beneficiaries of said five trusts." It was also set out in the Declaration that Kenneth G. Smith, the other trustee, was a direct beneficiary under one trust and a contingent beneficiary under the others.

Each trust provided that the securities transferred to and belonging to the trustees should be deposited and remain with the trustee, the Foreman Bros Banking Company (R. 56, 61, 66, 71, 78). Each trust also provided that in case of a vacancy in the trusteeship, the other trustees must name a successor and that at all times one of said trustees must be a bank or trust company of the City of Chicago (R. 7, 58, 63, 68, 73, 80).

Shortly after the creation of the trusts, in November, 1922, each of the trusts except one was modified by eliminating a provision for the payment of all taxes by the trustees (R. 59, 64, 69, 74). One of the trusts for the benefit of

the wife was modified to provide that the trust was in lieu of dower. The modification recited that such was the intent of the grantor and it was so understood by his wife (R. 59). On October 22, 1924, the grantor resigned as trustee and the trusts were so modified that thereafter Douglas Smith had no right, even in conjunction with another trustee, to revoke or modify (R. 8). All of the above corrections and changes were made with the written consent of one of the other trustees, as provided in the instruments.

Douglas Smith was subjected to a tax on all of his own income for 1924, at the graduated rates applicable thereto, and in addition, he was compelled to pay an additional amount measured by the income of the trusts for the period January 1st to October 22nd, 1924, at rates applicable to incomes in excess of his own income (R. 8, 9). The income so used as a measure of the exaction was never received, either directly or indirectly, by Douglas Smith (R. 7, 8, 9, 10). Douglas Smith could not have received any part of the income unless another one of the trustees consented to join him in revoking the trusts prior to the earning of the income.

The Statute Involved.

Section 219 (g) of the Revenue Act of 1924, approved June 2, 1924, provides as follows:

> "Sec. 219. (g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable years shall be included in computing the net income of the grantor." (U. S. C., Title 26, Sec. 960.)

Summary of Argument.

Section 219 (g), properly construed, includes trustees under the term "beneficiary of the trust". *White* v. *Erskine*, 47 F. (2d) 1014, 1016 (C. C. A. 1st). The intent and purpose of the exception inserted in the section was to exclude trusts which could not be revoked except with the consent of an adverse interest, such as a beneficiary or a trustee. A trustee, like the beneficiaries, is an adverse interest. *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 346; *Farmers' Loan & Trust Company* v. *Bowers*, 29 F. (2d) 14 (C. C. A. 2nd); *Hill* v. *Nichols*, 18 F. (2d) 139; *Stewart* v. *Commissioner*, 27 B. T. A. ..... (Jan. 31, 1933). Unless so construed, Section 219 (g) is unconstitutional in that it taxes one person upon the income of another, contrary to the decisions in *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206, and *Heiner* v. *Donnan*, 285 U. S. 312. A construction of a statute which makes it unconstitutional, or which even raises a grave doubt as to its constitutionality, will be rejected. In fact, this Court has said that language had been "strained" to

avoid a construction making a statute unconstitutional. *Blodgett* v. *Holden,* 275 U. S. 142, 148. In the construction of Section 219 (g), the word "beneficiary" must include trustees, who are in legal contemplation, and as admitted by the demurrer to the declaration in this case, the representatives of the beneficiaries. *Farmers' Loan & Trust Company* v. *Bowers, supra; White* v. *Erskine, supra; Stewart* v. *Commissioner, supra.*

Section 219 (g) does not by its terms apply to past transactions, and it has been repeatedly held that a statute will not be given retroactive effect unless its language is clear and imperative to that effect. *Shwab* v. *Doyle,* 258 U. S. 529, 535; *Llewellyn* v. *Frick,* 268 U. S. 238.

If Section 219 (g) is held to apply to the trusts here in question, it is to that extent unconstitutional and void, in contravention of the Fifth Amendment. It would thus tax one person upon the income of another. To tax the grantor on income of trusts which he never received, directly or indirectly, and which he never had any right to receive, and where his power of revocation could only be exercised with the written consent of an independent trustee, is to tax him upon the income of another. The case of *Corliss* v. *Bowers,* 281 U. S. 376, was decided solely on the basis of the grantor's unfettered continuing command or power over both the corpus and income of the trust; in other words, the ever-present, unrestricted power to receive the income was held to be in substance the same as the receipt of the income. The case has no application to the case at bar. The transfer of the property in this case was complete from the grantor to the trustees, and the accrual of income and the right thereto were in the trustees and the ultimate beneficiaries. The grantor had no right either to the corpus of the trust or to the income, except and unless an independent person or as we think in this case, a

person with an adverse interest, consented to give it to him. *Reinecke* v. *Northern Trust Company, supra.*

The mere fact that the rights of the ultimate beneficiaries may be subject to change in no way interferes with the completeness of the disposition by the grantor. *Reinecke* v. *Northern Trust Company, supra; Chase National Bank* v. *United States,* 278 U. S. 327, 336. The case of *Saltonstall* v. *Saltonstall,* 276 U. S. 260, has no bearing on the case. The Court was there dealing with a succession tax, and merely held that if the recipient of the property did not secure complete rights to it until the death in question, the perfection of the rights in the property of the beneficiary was subject to a succession tax. The distinction between the situation in the *Saltonstall* case and the case at bar was set out in the case of *Chase National Bank* v. *United States, supra,* page 336.

If, under any circumstances, Section 219 (g) can be held to be constitutional as applied to the trusts of the character of those in this case, it can only be as to such trusts created after its enactment. The trusts here under consideratiton were created in 1922, at a time when the income from trusts even though revocable solely by the grantor was not taxable to the grantor. *Law Opinion,* 1102, *C. B.* I-2 page 50. The transfer of the property to the trustees was complete and it was beyond the power of the grantor, acting alone, to secure for himself either the corpus or any part of the income. An attempt to tax the grantor on such property or on such income, which was not earned by him, never accrued to him, and which he could not alone secure, is arbitrary, capricious and void. *Nichols* v. *Coolidge,* 274 U. S. 531; *Untermyer* v. *Anderson,* 276 U. S. 440; *Blodgett* v. *Holden,* 275 U. S. 142. This was the ground upon which the decision rested in the Court below.

ARGUMENT.

Introduction.

Taxes on incomes are direct taxes. *Pollock* v. *Farmers' Loan & Trust Company,* 158 U. S. 601. The Sixteenth Amendment removed the necessity for apportionment. It did not change the nature of the tax. There has been no attempt subsequent to the adoption of the Sixteenth Amendment to impose a tax *in rem* on income. The collection of the tax is not confined to the income itself, but becomes a personal liability against the person receiving it and may be collected from any other assets which he may have.

Every income tax has been imposed upon a person, natural or artificial, and the rate of such tax varies according to whose income it is and how much income he has. The rate on corporations is different from the rate on individuals. The rates on individuals vary with the amount of income.

It is therefore fundamental that in order to impose such a direct tax, measured by income, the income must be the income of the person sought to be taxed. In the case at bar, the income in question was subject to tax but to the true owners and recipients thereof, and only them. It cannot be taxed to a person who did not earn it, did not receive and had no right to receive it. The decisions of this court have maintained this position. Congress may impose a tax upon a person based upon *his* income. Such a tax may be imposed regardless of what disposition he may make of the income. If in fact he earned the income

or received it, it is subject to tax even though he gives it away or disposes of it either by a prior or a subsequent agreement. The test in all cases is whether or not it was his income.

The cases of *Lucas* v. *Earl*, 281 U. S. 111, and *Burnet* v. *Leininger*, 285 U. S. 136, are such cases. The basis of the decisions in these cases was that the income was earned by the person sought to be taxed. The same would be true as to income on property owned by the person sought to be taxed.

It has been no objection to the validity of a tax on income that it was applied retroactively, provided it was the income of the person sought to be taxed. In all such cases, the tax was imposed upon the person who in fact received the income. Such are the cases of *Taft* v. *Bowers*, 278 U. S. 470; *Cooper* v. *United States*, 280 U. S. 409. To the same effect is the decision in *Corliss* v. *Bowers*, 281 U. S. 376, *supra*, the court having held that under the particular facts of that case, the continuing and unfettered right to take the income in the person sought to be taxed was the same as the income itself.

On the other hand, this Court has always held invalid an attempt to tax one person upon the income of another or upon the property of another. *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206, *supra; Heiner* v. *Donnan*, 285 U. S. 312, *supra; Schlesinger* v. *Wisconsin*, 270 U. S. 230. See also *Wells* v. *Commissioner*, decided February 4, 1933 (C. C. A. 8th); *Frew* v. *Bowers*, 12 F. (2d) 625. Cf. *Poe* v. *Seaborn*, 282 U. S. 101. Such is the case at bar.

Counsel for petitioner have attempted to bring this case under the decision of *Corliss* v. *Bowers*. It is respectfully suggested that in attempting to do so, they have gone

outside of, and in fact, contrary to the record. On page 5, counsel state:

> "The power of revocation was subject to no fiduciary limitations, express or implied. When exercised with the consent of the trustee, who had no interest adverse to the settlor, and was no doubt selected to do his will, it was as absolute as the power in *Corliss* v. *Bowers.*"

On page 14, it is stated that the grantor would choose a trustee who may be "trusted to carry out his wishes." Later, they speak of the trustee as a "straw man". The facts stated in the declaration and admitted by demurrer, show that one of the trustees was a beneficiary under all of the trusts in every sense of the word. The other trustee was a public banking and trust company of the City of Chicago. We do not think that counsel are warranted in the many statements in their brief that such a trustee must be considered a mere dummy or a tool for the purpose of tax evasion. Bear in mind that the trusts in this case were created and the trustees named long before the provision now under consideration was even contemplated by Congress. At the time of the creation of the trusts, there was no occasion whatever for the naming of dummy trustees. Even the income from revocable trusts was not then taxed to the grantor. The statements of counsel are in effect a charge of a fraudulent attempt to evade taxes by the use of trustees who were not in fact and in law trustees but were merely tools to do the bidding of the grantor. We repeat that there is absolutely no foundation for such statements, and that they are directly contrary to the admitted allegations of fact in the declaration (R. 9-11, Par. 15, 16). If petitioner had any basis for any such charge that the trustees were but *alter egos* for the grantor, or under some agreement to do his bid-

ding, it was her privilege and duty to set up such allegations by way of answer and let the issue be tried as one of fact. It must be presumed that she knew the contrary to be the fact and admitted the allegations of the declaration, having in mind, particularly, that she first filed a general issue and subsequently withdrew it and filed a demurrer (R. 81-83).

Counsel argue that the fact that a modification was made in the wife's trust is evidence that the trustee must be considered a mere dummy. In November, 1922, certain modifications were made in each of the trusts not here important, but in the nature of corrections. The modification in the wife's trust referred to, stated that it was in accordance with the understanding, in which event the trust instrument would have been subject to reformation in a court of equity. The recital in the modification would indicate rather that the wife consented to the modification than otherwise. The fact that a trustee consented to what he considered a correction or a fair and proper modification is, of course, no indication of what he might do under other circumstances.

It is respectfully suggested that the draftsman of a trust may not have properly performed his duty if he did not provide some method for the correction of errors or of modifying the trust due to unforeseen and changed conditions. In *People* v. *Northern Trust Co.*, 289 Ill. 475, 481, 124 N. E. 662, the court said:

> "All well-skilled and far-seeing lawyers advising for the benefit of their clients usually suggest the insertion of such a clause of revocation, * * *."

The effort, therefore, to bring the case within the doctrine of *Corliss* v. *Bowers* by assuming that the Foreman-State Trust and Savings Bank was a mere dummy is totally un-

warranted on the record. We think that we are entirely justified in considering the assumption and the argument based thereon as out of the case.

In the proper construction of Section 219 (g), the word "beneficiary" must be held to include trustees.

We must bear in mind that it is beyond the power of Congress to impose a direct tax on one person based upon the income of another. A construction which produces such a result should be rejected. It may well be that the words "trustee" and "beneficiary" have different meanings and are used to distinguish between the rights, duties and functions of certain parties to a trust. In the case before us, however, we are concerned with a grantor or creator of a trust, on the one side, and all those persons who have the legal and equitable rights, on the other,—the persons interested in maintaining the trust, either because of direct interest therein, or because of their legal obligations in their fiduciary capacity.

The construction which we suggest effectuates the purpose of Congress with reference to revocable trusts. If the right of revocation is subject to a prior consent of an independent third person, and particularly, of a person adversely interested, it ceases to be a power in the grantor. In effect, it is solely the power of the trustee because the consent of the prospective donee of property can be presumed. This construction avoids the constitutional objection. A construction of a statute which even raises a grave doubt as to its constitutionality will be rejected. *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 348, 349; *Llewellyn* v. *Frick*, 268 U. S. 238, 251; *Blodgett* v. *Holden*, 275 U. S. 142, 148.

The grantor in this case had completely disposed of both the legal and equitable title to the property in question.

The legal title was in the trustees. True, the grantor was one of three trustees, but his sharing in the legal title as one of three trustees is distinctly different from any title which he previously had or might have as an individual. Likewise, the equitable title had been completely disposed of. It would require an affirmative written instrument by a trustee to give the grantor any interest in either the property or the income. In fact, it would require the same affirmative action to give the grantor an interest in the property as it would to give it to a stranger. It is suggested, therefore, that counsel are in error in stating that an interest in the property remained in the grantor. They have failed to distinguish between a title in the grantor individually and a bare legal title in the three trustees, of whom he was only one.

The intent and purpose of the exception inserted into Section 219 (g) was to exclude from the operation of that section trusts which could not be revoked by the grantor except with the consent of interests adverse to his, such as a beneficiary. See *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 346. A trustee who has in this connection a substantial obligation to maintain and preserve the rights and interests of all the beneficiaries, is himself, of necessity, such an adverse interest, and Section 219 (g) must be held inapplicable to a trust revocable only with his consent.

That the Act is to be so construed has been decided. In a case involving Section 302 (d) of the 1924 Act (the companion estate tax section to Section 219 (g)), which is applicable by its terms to trusts which could be altered, amended or revoked by the grantor "*in conjunction with any person,*" without any exception, the Circuit Court of Appeals for the First Circuit held the Act inapplicable to a trust which could be altered only with the consent of a

trustee. The reasons given by the court were that Section 302 (d) was not intended to be broader in its application than Section 219 (g), and that Section 219 (g) excludes from its operation trusts requiring for their revocation the consent of an adverse interest, such as a beneficiary *or a trustee.* *White* v. *Erskine,* 47 F. (2d) 1014, 1016. The court said:

> "The Committee's report was as follows: 'This provision is in accord with the principle of Sec. 219 (g) of the bill which taxes to the grantor the income of *revocable trusts.*'
>
> "In other words, where a grantor, either alone or in conjunction with anyone not a beneficiary under the trust, has retained 'the power to revest in himself title to any part of the trust,' to quote from section 219 (g), then the body of the trust at the death of the decedent may be included in the value of the gross estate; but where the decedent has no such power *except by the consent of an adverse party as one of the beneficiaries, or as in this instance of the trustee for the beneficiaries,* the right of revocation is gone from the donor and also all beneficial interest for taxing purposes under section 301 of the act." (Italics supplied.)

No appeal was taken by the government from this case.

In the District Court, the court seems to have held that Section 302 (d) was unconstitutional. *Erskine* v. *White,* 43 F. (2d) 765. In doing so the court held that a trustee was an adverse interest and that the case was controlled by the principle of the case of *Reinecke* v. *Northern Trust Company,* 278 U. S. 339, 346, *supra,* in which the trusts were revocable with the consent of the beneficiaries.

In *Farmers' Loan & Trust Company* v. *Bowers*, 29 F. (2d) 14, 16, 17, *supra*, speaking of the duty of the trustee, there a trust company, with respect to joining in a power of revocation requiring its consent the court said:

> "By the indenture of May, 1916, the settlor parted with all control over the corpus of the trust, except a conditional power to revoke, and then only with the consent of the trustee. The trustee had obligations with respect to the trust property and the rights of the beneficiaries. Its consent would be granted only with due regard for such duties. Thus the settlor was beyond the power legally to control. * * *
>
> "Moreover, the consent of the trustee to revoke must be honest and in accord with the legal rights of the *cestui que trustent*. It is always subject to review by a court of equity."

In *Commissioner* v. *McCormick*, 43 F. (2d) 277, 278, 279, the Circuit Court of Appeals for the Seventh Circuit said:

> "These conditions may make settlor's power to revoke dependent upon the consent of outside parties whose interests are adverse to those of settlor. Such was the case of *Farmers' Loan & Trust Company* v. *Bowers*, * * * where the settlor could revoke only in case the trustee consented."

The decision in that case was reversed by this Court, but on grounds sustaining the irrevocability of the trust. *McCormick* v. *Burnet*, 283 U. S. 784.

The only tribunal which has held contrary to respondents' contention that the word "beneficiary" includes a trustee, is the Board of Tax Appeals, in *Bromley* v. *Commissioner*, 26 B. T. A. 878. The later case of *Stewart* v. *Commissioner*, decided January 31, 1933, however, followed

the case of *White* v. *Erskine, supra,* which held that trustees were beneficiaries within the meaning of the section in question.

The trustees in this case had a direct pecuniary interest in maintaining the trust. They were to receive compensation for their servies. This is one of the important functions of and sources of income to a public trust company.

In order, therefore, to effectuate the purpose of Congress, to avoid an unconstitutional result, and in accordance with the cases cited above, the word "beneficiary" in Section 219 (g) should be construed to include trustees.

Retroactive Construction.

It might be noted that Section 219 (g) does not expressly apply to trusts created prior to its enactment. When a statute is to be applied retroactively, it should be in express language. *Llewellyn* v. *Frick,* 268 U. S. 238, *Shwab* v. *Doyle,* 258 U. S. 529. In the latter case, the Court said (p. 535):

> "There is certainly in it no declaration of retroactivity, 'clear, strong and imperative', which is the condition expressed in *United States* v. *Heth,* 3 Cranch 398, 413; also *United States* v. *Burr,* 159 U. S. 78, 82-83."

Section 302 (d), the companion estate tax provision to Section 219 (g), was expressly made retroactive by Section 302 (h).

But it is stated that the income tax provisions of the Revenue Act of 1924 were retroactive to January 1, 1924, and that such a result was reached in the *Corliss* case. This contention, however, overlooks the fundamental dis-

tinction between income received by the person sought to be taxed, or income which he could have received, on the one hand, and income of another which the person sought to be taxed did not and could not receive.

The *Corliss* case treated the trust as a continuing gift, and therefore, each item of income earned by the grantor and given away as earned. It was upon such a theory that *Burnet* v. *Guggenheim,* (No. 283, Oct. Term, 1932) was decided. If the fact that a person sees fit to give away his income through the medium of a trust beyond his power to recall is the basis for an attempt by Congress to impose a tax upon him, it is in the nature of an excise or a penalty for disposing of his property, and if it can be done, must be prospective. *Blodgett* v. *Holden,* 275 U. S. 142; *Untermyer* v. *Anderson,* 276 U. S. 440.

If Section 219 (g) Is Held to Apply to the Trusts Here in Question, It Is to that Extent Unconstitutional and Void Because it Deprives the Grantor of Property Without Due Process of Law, in Contravention of the Fifth Amendment.

It is not within the power of Congress to tax one person upon the income of another.

After the decision in *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, reaffirmed in *Heiner* v. *Donnan,* 285 U. S. 312, we see no occasion to further discuss this principle.

The only remaining question, then, is whether or not the income from these trusts was at any time the income of the grantor. The trusts were created in 1922. The conveyance of the legal title to the trustees was absolute and complete. The disposition of the income was complete. After the creation of these trusts, the grantor, as an individual, had no legal or equitable rights in the property or the income therefrom. He could not have any interest

in the property or the income except and unless an independent third person, acting in a fiduciary capacity, should in writing give him such an interest. In exactly the same manner that the property could be given to Douglas Smith, it could be given to a stranger.

The income from these trusts which is sought to be used as a measure for taxing the grantor was income earned in 1924. Such income was never, therefore, the income of the grantor. As stated, he had no right to the income. The effort, therefore, to tax the grantor on this income is nothing more nor less than an effort to tax one person upon the income of another.

Counsel for petitioner have cited many cases of assignment of income wherein the assignor was subjected to the tax on the income assigned. In every such case, the decision rested upon the fact that the income when earned was the income of the assignor. The cases merely held that a person could not either by previous or subsequent agreement assign income which he, himself, earned or which was earned on property owned by him.

Lucas v. *Earl*, 281 U. S. 111, merely establishes that where a man produces income by his labor, it is necessarily his before it can be another's, because his labor is essential to its production, just as income producing property is to its income, and it may be taxed to him. In *Burnet* v. *Leininger*, 285 U. S. 136, the wife did not become a member of the partnership and the ownership of the partnership property remained unaltered. That property and the labor of the partners, including the husband, produced the income which was his first and hers afterwards.

We do not think it will serve any useful purpose to discuss in detail the many such cases cited. As stated,

they do not support petitioner's contention in this case. On the contrary, if analyzed, it will appear that where the property which produced the income was in fact assigned prior to the creation of the income, even though subject to a possible reverter, the income may not be taxed to the assignor (*infra*, page 22).

Counsel for petitioner have attempted to apply the principle of the assignment cases on the theory that the grantor retained some form or part of a title to which the income could attach as earned. Counsel are clearly in error. In this case the grantor as an individual retained no title whatever. There was a complete conveyance to three trustees, of which he was one. A title in a person as trustee is entirely different from an individual title. The income arising from the property, therefore, was the income on the property owned by the trustees, and not on property owned by the grantor.

It is upon such a premise that counsel invoke the decision in *Saltonstall* v. *Saltonstall*, 276 U. S. 260. This case arose under the Massachusetts *succession* tax. The question was not whether the grantor had retained any interest in or control over the trust property, but whether, upon the termination of a power at the death of the grantor, the beneficiaries received something which they had not had before, namely, the property freed of the power. The tax being upon the receipt of the property, could be applied when it was received, free and clear of all possible powers of removal. This Court distinguished the *Saltonstall* case in *Chase National Bank* v. *United States*, 278 U. S. 327, 336, saying that the distinction between a succession tax and a transfer tax was important because it was at least doubtful whether upon the death of the grantor there was any such termination, as to him, of a power of control over the remainder such as would have been subject to a tax

on transfers, since the power was not vested in him alone, but in him and another, citing *Reinecke* v. *Northern Trust Company*. In the case at bar, the legal title was in the trustees. The equitable title was vested in the beneficiaries, even though it may have been subject to a dual power to transfer to someone else, whether it be the grantor or a stranger. The fact that the beneficial interest may not have been complete and final in a beneficiary in that it was subject to change, in no way places any right or title in the grantor until such change is effected. He, alone, had no right to make the change. We think it clear, therefore, that counsel has entirely misconceived the decision in *Saltonstall* v. *Saltonstall*. Merely because the title is not complete in a certain beneficiary, it does not follow that there is a title in the grantor which carries with it the right to income.

Other cases are cited which involved estates by the entirety or joint estates. In each of them the decedent retained until his death a substantial interest in and right to enjoy the property taxed to his estate. In *Porter* v. *Commissioner*, 60 F. (2d) 673, now pending before this Court, No. 466, October Term, 1932, the grantor retained to himself *alone* a power to change the ownership which counsel might argue was part of that bundle of rights constituting complete ownership and dominion. Besides, as pointed out in *Tyler* v. *United States*, 281 U. S. 497, 503, in the special sub-sections of the Acts Congress may have gone beyond a tax on transfers exclusively. The *Porter* case could be affirmed on the ground of this sole power without in any wise affecting the decision in this case.

Counsel state that if this trust property should be taxable to the estate of the grantor under Section 302, the income should be taxable to him under Section 219 (g),

and then urge that the property would be subject to tax as a part of the grantor's estate. Of course, it does not follow by any means that the right to include property in the gross estate of a decedent is the same as the right to tax income. Property transferred in contemplation of death may be subject to a transfer tax. The test of taxability of income is always whether or not it was the income of the person sought to be taxed. Assuming, however, that counsel are correct in their premise, the conclusion does not follow. If property has been transferred and may not be recovered without the affirmative consent of a third person, it may not be taxed, as a part of the decedent's estate. No case has ever held otherwise. On the contrary, *Farmers' Loan & Trust Company* v. *Bowers, Hill* v. *Nichols, White* v. *Erskine,* and *Stewart* v. *Commissioner,* are directly to the contrary. To the same effect must be considered *Reinecke* v. *Northern Trust Company.* In *Chase National Bank* v. *United States,* 278 U. S. 327, 336, this Court said:

> "That, it is true, was said of a succession tax, and we are here concerned with a transfer tax. The distinction was there important for it was at least doubtful whether upon the death of the settlor there was any such termination, as to him, of a power of control over the remainder such as would have been subject to a tax levied exclusively on transfers, since the power was not vested in him alone, but in him and another. See *Reinecke* v. *Northern Trust Company,* decided this day, *post,* p. 339."

Counsel contend that the existence of the power to revoke or modify in the grantor and one of the two other trustees was tantamount to the fee of the property being in them. From both a practical and legal point of view,

that contention cannot be sustained. Where one alone has a general power, he is considered as having the fee because he can take it and enjoy it or sell it at will. But where there is a joint power, unless and until the other consents, neither has anything. From the point of view of each, it is as if the other alone held the power of appointing to him. And a person to whom property can be appointed has nothing until the power is exercised. Both practically and legally, it is then that he comes into the property. See *Sugden on Powers,* 8th Ed., p. 470, Par. 3, p. 467, Par. 33, 34. See the discussion in *Chanler* v. *Kelsey,* 205 U. S. 466. And it has been consistently held that where a gift of income producing property was subject to a condition subsequent, upon the happening of which the property was to revert to the donor, the income prior thereto was taxable to the donee, not the donor. *Nelson* v. *Ferguson,* 56 F. (2d) 121, 124, (C. C. A., 3rd), cert. denied, 286 U. S. 565, cited by counsel for petitioner; *Edson* v. *Lucas,* 40 F. (2d) 398 (C. C. A. 8th); *Shellabarger* v. *Commissioner,* 38 F. (2d) 566, 567 (C. C. A. 7th); *Bettendorf* v. *Commissioner,* 49 F. (2d) 173 (C. C. A. 8th); *Commissioner* v. *Olds,* 60 F. (2d) 252 (C. C. A. 6th). It cannot be doubted that if the donor disposes of the present right to beneficially enjoy the property, meaning its income, and retains only a right of future enjoyment, such as a remainder in fee, the income during the life of the life tenant could not be taxed to the donor, even though the life tenant might die the next day. If not in the case where he has a vested remainder, then *a fortiori* not in the case where the grantor has nothing. Counsel wholly misconceive the import of the imperfection in the interest of the beneficiaries by reason of being subject to the power. Even in the *Reinecke* case with respect to the trust revocable with the consent of four of the five beneficiaries, the interest of the fifth beneficiary is defec-

tive by reason of a possible divestiture, and yet the grantor was there held to have retained no beneficial interest in or control over the trust property. And for like reasons, the quotation taken at random from *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace,* 53 S. Ct. 345, No. 176, Oct. Term, 1932, decided February 6, 1933, and *Bromley* v. *McCaughn,* 280 U. S. 124, 136-138, in view of the facts of those cases and the nature of the tax involved, are here inapplicable. In each of them the tax, an excise, was imposed on the taxpayer by reason of his exercise of one of the beneficial attributes of ownership which he then presently had.[1]

This case is clearly controlled by the decisions of this court in *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, *supra; Heiner* v. *Donnan,* 285 U. S. 312, *supra;* and *Reinecke* v. *Northern Trust Company,* 278 U. S. 339, *supra.* As applied to the facts of this case, if it be held to apply, Section 219 (g) violates the Fifth Amendment and is void regardless of when the trusts were created.

A Statutory Enactment Which Is Void Cannot Be Validated Because of an Alleged Purpose to Prevent Tax Evasion.

If, in fact, a legal and binding contract could and did exist compelling the trustee to obey the grantor's request, there is a revocable trust. If there is, in fact, collusion

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[1]Counsel for petitioner suggest that if the income is not taxed to the grantor, it escapes taxation because the statute excludes gifts and the income from moment to moment must be considered first as the grantor's income and then a gift by him. This begs the whole question. If Sec. 219 (g) does not govern, Sec. 219 (b) requires the income be taxed to the trustees or the beneficiaries. Income may validly be taxed to the person who receives and enjoys it. *Taft* v. *Bowers,* 278 U. S. 470; *Irwin* v. *Gavit,* 268 U. S. 161.

or fraud, there may be a revocable trust. If such facts exist, they must be proven. In the case at bar the contrary existed and was admitted by the demurrer to this declaration. In effect, it is argued, however, that Section 219 (g) conclusively presumes collusion or fraud or some exclusive right in the grantor. If that is the effect of Section 219 (g), it is invalid, and we think that any possible contention to the contrary was definitely set at rest in *Heiner* v. *Donnan.*

It is suggested that where the grantor selects the trustees whose consents are necessary to a revocation, there is a stronger possibility that the trust might be revoked. Possibilities, or even probabilities, do not vest title or control in the grantor. As long as the trustee has a right to refuse to give his consent, the grantor is absolutely helpless, and a tax imposed upon him would be based upon property or income which he did not own and did not have the right to take. The possibilities or probabilities are not one bit stronger than that a husband may convey property to a wife or that a wife may convey property to a husband, if, indeed, so strong. This court refused to indulge any such presumption in *Hoeper* v. *Tax Commission of Wisconsin.* In *Marshall* v. *Commissioner,* 57 F. (2d) 633, (C. C. A. 6th), *certiorari* denied Oct. 10, 1932, 53 S. Ct. 20, there was evidence of the wife that she depended entirely upon the advice of her husband in business affairs and would do as he advised her to do, and if he so desired, would give him back the property which he had given to her. It was held that the income from such property could not be taxed to the husband.

If, in fact, there is an illegal tax evasion, let it be proven and dealt with in each case. Congressional fiat, which would impose a penalty on the innocent as well as the guilty is obviously void.

If Section 219 (g) Is Held to Apply Retroactively to the Trusts in Question, It Is Arbitrary and Capricious and Therefore Contrary to the Fifth Amendment to the Constitution.

The income of trusts of the character of those here in question was not taxable to the grantor in 1922 when they were established, for the income even of trusts revocable by the grantor alone, was not taxable to him. *Law Opinion* 1102, C. B. I-2, p. 50.

As heretofore pointed out, in 1922, Douglas Smith completely disposed of the legal and equitable title and the right to income from the property in question. At that time, he made it impossible, by his own act, to regain any control, right, title or interest in the property.

Section 219 (g), if applied to the facts in this case, would for the first time in 1924 designate the grantor as the person to pay a tax measured by income, the right to which was thus completely disposed of by him in 1922 along with the property which produced it. Not only does Section 219 (g) tax a person upon income of another, but, if applied to the facts of this case, it would impose that tax without warning after the trust property and income therefrom had passed beyond recall.

Suppose a grantor had thus disposed of all of his property and subsequently Congress imposed upon him a tax measured by the income thereon, he could not pay the tax nor could he compel the trustees or beneficiaries to pay it for him. Suppose he had placed in such a trust his highest grade securities or investments and had retained for himself more or less speculative securities, which is not an unusual situation. The developments of the last few years have shown that the property retained by him might have become completely worthless. Nevertheless, ac-

cording to petitioner, he is subjected to a tax because of the income or the property which he had given away. A shocking result! This Court has in every instance refused to bring about such a result where the transaction which put it beyond the assignor's right of recall occurred prior to the legislative enactment and when no similar law existed.

If such a tax could be sustained at all as an excise on the making of such a gift, it can only be sustained if made after the passage of the Act with full knowledge of the consequence. The decisions of this court in *Nichols* v. *Coolidge*, 274 U. S. 531; *Untermyer* v. *Anderson*, 276 U. S. 440; and *Blodgett* v. *Holden*, 275 U. S. 142, are entirely determinative of this case. Under them, as applied to the trusts here involved, Section 219 (g) is invalid as depriving the grantor of his property arbitrarily and capriciously, in violation of the due process of law guaranteed by the Fifth Amendment. As said by the Court of Appeals in this case:

> "When an attempt is made to apply those measures to pass lawful transactions by which the grantor has parted with control over the trust fund and has made it impossible to regain such control by his own act, a different question arises. Under the broadest conception of legislative power, that which is not the income of the taxpayer and which it is impossible for him to make a part of his income may not be required arbitrarily to be included in his income. Such an attempt amounts to confiscation and offends the fifth amendment."

If it is shocking to one's sense of fairness that a man should be required to pay taxes on income which has passed out of his control, which he never received or enjoyed,

and which he cannot use to pay the tax, it is utterly arbitrary and capricious to impose such a tax without warning after the gift is made.

> "Such an exaction is not taxation but spoilation. 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property.' *United States* v. *Railroad Co.,* 17 Wall. 322, 326." *Heiner* v. *Donnan,* 285 U. S. 312, 327.

CONCLUSION.

The tax paid by respondents' testator on account of the 1924 income of the trusts here in question was exacted and collected by petitioner without warrant of law, and the judgment for respondents should be affirmed.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

The Revenue Act of 1924, c. 234, 43 Stat. 253, 277, 304, contained the following provisions:

"Sec. 219. * * *

"(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * *

"(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year;

* * *

"(g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor. (U. S. C., Title 26, Section 960.)

"Sec. 302. * * *

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth;

* * *

"(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act." (U. S. C., Title 26, Sec. 1094.)

SUPREME COURT OF THE UNITED STATES.

No. 601.—October Term, 1932.

Mabel G. Reinecke, formerly Collector of Internal Revenue, Petitioner, *vs.* Kenneth G. Smith et al., Executors of the Will of Douglas Smith.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[April 10, 1933.]

Mr. Justice Roberts delivered the opinion of the Court.

In 1922 Douglas Smith, by five instruments, created as many trusts for the benefit of his wife and four children. The trustees named were the grantor; a son who was a direct beneficiary of one of the trusts and a contingent beneficiary of the others; and a banking company possessed of trust powers. Neither the grantor nor the corporate trustee was a *cestui que trust* under any of the writings. In each agreement it was stipulated:

"Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith (the grantor) and either one of the other two trustees or their successors."

October 22, 1924, each of the agreements was modified by striking out the quoted clause, and the grantor resigned as trustee. He did not report any of the income which accrued in the year 1924 upon the trust property. The Revenue Act of 1924, Sec. 219 (g) (43 Stat. 253, 277) directs:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

The Commissioner of Internal Revenue held that this section required a return by Smith of the trust income for the period January 1, 1924, to October 22, 1924, and assessed against him

additional tax, which was paid under protest. The respondents, who are the personal representatives of Smith, now deceased, brought this suit to recover the sum paid. A demurrer to the declaration was overruled and judgment given for the respondents. The Circuit Court of Appeals affirmed, holding that as to trusts created prior to the adoption of the Act section 219 (g) violates the Fifth Amendment when applied to impose a tax by reason of property and the income therefrom disposed of by the grantor before the passage of that or any other law taxing the income of such a trust to the settlor. The case is here on certiorari.

Petitioner maintains the section in terms applies in the circumstances disclosed; as the tax is laid only upon income accruing after January 1, 1924, the statute is not retroactive; and, as the grantor retained a measure of control, to tax him upon the income is not arbitrary or unreasonable though the trusts were created before any statute had laid a tax upon the settlor measured by the income of such a trust.

The respondents argue in support of the judgment that the trustee is a beneficiary of the trust as the phrase is used in the section and the income in question is therefore exempt from taxation to the settlor; and that if this view be rejected the provision offends the Fifth Amendment.

The unambiguous phraseology of the Act precludes the suggested construction. A trustee is not subsumed under the designation beneficiary. Both words have a common and accepted meaning; the former signifies the person who holds title to the *res* and administers it for the benefit of others; the latter the *cestui que trust* who enjoys the advantages of such administration. The ordinary meaning of the terms used, which we are bound to adopt (*Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560), and the view held by those charged with the enforcement of the Act, ratified by reenactment of the section,[1] alike forbid the adoption of the construction for which the respondents contend.

Nor do we think the act has such a retroactive effect as to render its requirements arbitrary within the principle announced as to estate and gift taxes in *Nichols* v. *Coolidge*, 274 U. S. 531; *Unter-*

[1]Revenue Acts of 1926 (c. 27, 44 Stat. 32); 1928 (c. 852, 45 Stat. 840); 1932 (c. 209, 47 Stat. 221). Regulations 65, Art. 347; Regulations 69, Art. 347; Regulations 74, Art. 881.

myer v. *Anderson*, 276 U. S. 440, and *Blodgett* v. *Holden*, 275 U. S. 142. In those cases the issue was the validity of a tax on a transaction consummated before the enactment of the statute authorizing the exaction. In the present case the subject of the tax is not the creation of the trusts or the transfer of the corpus from the grantor to the trustees, but the income of the trusts which accrued after January 1, 1924, the effective date of the Revenue Act of 1924.[2] Although the act was passed June 2, 1924, the imposition of the tax on income received or accrued from the beginning of the year has been held unobjectionable. *Cooper* v. *United States*, 280 U. S. 409, 411. Compare *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 379.

We come then to the final position of the respondents: That when applied in this case the statute is so arbitrary and unreasonable as to deny the due process guaranteed by the Fifth Amendment, since the exaction is based not on the settlor's income or on income from his property, but on that which accrued to other persons from property to which they alone had sole and exclusive title. The argument proceeds upon the theory that until alteration or revocation of the trust the trustees held the legal title to the property for the sole benefit of the *cestuis*, and received the income; that both principal and income were beyond the control of the grantor until the alteration of the trust on October 22, 1924.

We have not heretofore had occasion to pass upon the question thus presented. In *Corliss* v. *Bowers*, 281 U. S. 376, the section of the Revenue Act of 1924 now under consideration was held to justify assessment of income tax to the settlor with respect to the income of a trust revocable by him alone. *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, construed Section 402 (c) of the Revenue Act of 1921, which included within the sweep of a transfer tax any interest of which a decedent had at any time made a transfer, or with respect to which he had created a trust intended to take effect in possession or enjoyment at or after his death. The tax was upheld as applied to the corpus of trusts over which the grantor had sole power of revocation. It was, however, condemned as to those where revocation was dependent upon joint action of the grantor and the beneficiary, for the reason that the interest of the beneficiary was adverse and the grantor unable at will to alter or destroy the trust. In the latter case the transfer was

[2]See Section 283, 42 Stat. 303.

said to be effective when made, not at death. As pointed out in *Burnet* v. *Guggenheim,* No. 283, October Term, 1932, the same considerations as to ownership and control affect the power to impose a tax on the transfer of the corpus and upon the income.

In approaching the decision of the question before us it is to be borne in mind that the trustee is not a trustee of the power of revocation and owes no duty to the beneficiary to resist alteration or revocation of the trust. Of course he owes a duty to the beneficiary to protect the trust *res,* faithfully to administer it, and to distribute the income; but the very fact that he participates in the right of alteration or revocation negatives any fiduciary duty to the beneficiary to refrain from exercising the power. The facts of this case illustrate the point; for it appears the trust in favor of the grantor's wife was substantially modified, to her financial detriment, by the concurrent action of the grantor and the trustees. This case must be viewed, therefore, as if the reserved right of revocation had been vested jointly in the grantor and a stranger to the trust.

Decisions of this court declare that where taxing acts are challenged we look not to the refinements of title but to the actual command over the property taxed,—the actual benefit for which the tax is paid. *Corliss* v. *Bowers, supra,* at p. 378; *Tyler* v. *United States,* 281 U. S. 497, 503; *Burnet* v. *Guggenheim, supra.* A settlor who at every moment retains the power to repossess the corpus and enjoy the income has such a measure of control as justifies the imposition of the tax upon him. *Corliss* v. *Bowers, supra.* We think Congress may with reason declare that where one has placed his property in trust subject to a right of revocation in himself and another, not a beneficiary, he shall be deemed to be in control of the property. We cannot say that this enactment is so arbitrary and capricious as to amount to a deprivation of property without due process of law. As declared by the Committee reporting the section in question, a revocable trust amounts, in its practical aspects, to no more than an assignment of income. This court has repeatedly said that such an assignment, where the assignor continued to own the corpus, does not immunize him from taxation upon the income. *Burnet* v. *Leininger,* 285 U. S. 136; *Lucas* v. *Earl,* 281 U. S. 111. It cannot therefore be successfully urged that as the legal title was held by the trustees the income necessarily must for income taxation be deemed to accrue

from property of someone other than Douglas Smith. The case is plainly distinguishable from *Hoeper* v. *Tax Commission*, 284 U. S. 206, on which respondents rely, for there the attempt was to tax income arising from property always owned by one other than the taxpayer, who had never had title to or control over either the property or the income from it. The measure of control of corpus and income retained by the grantor was sufficient to justify the attribution of the income of the trust to him. The enactment does not violate the Fifth Amendment.

A contrary decision would make evasion of the tax a simple matter. There being no legally significant distinction between the trustee and a stranger to the trust as joint holder with the grantor of a power to revoke, if the contention of the respondents were accepted it would be easy to select a friend or relative as co-holder of such a power and so place large amounts of principal and income accruing therefrom beyond the reach of taxation upon the grantor while he retained to all intents and purposes control of both. Congress had power, in order to make the system of income taxation complete and consistent and to prevent facile evasion of the law, to make provision by Section 219 (g) for taxation of trust income to the grantor in the circumstances here disclosed. Compare *Taft* v. *Bowers*, 278 U. S. 470, 482, 483; *Tyler* v. *United States*, *supra*, at p. 505.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.